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No.

In the Supreme Court of the United States

LOS ROVELL DAHDA AND ROOSEVELT RICO DAHDA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, requires suppression of evidence obtained pursuant to a wiretap order that is facially insufficient because the order exceeds the judge's territorial jurisdiction.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Los Rovell Dahda and Roosevelt Rico Dahda respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Tenth Circuit in these cases. Pursuant to Rule 12.4, petitioners file a single petition covering the judgments in both of their cases, as they arise from the same court and involve identical or closely related questions.

OPINIONS BELOW

The opinion of the court of appeals in *United States* v. *Los Rovell Dahda* (App., *infra*, 1a-31a) is reported at 853 F.3d 1101. The opinion of the court of appeals in *United*

States v. *Roosevelt Rico Dahda* (App., *infra*, 32a-58a) is reported at 852 F.3d 1282. The order of the district court denying petitioners' motion to suppress (App., *infra*, 59a-65a) is unreported. The magistrate judge's report and recommendation that petitioners' motion be denied (App., *infra*, 66a-76a) is also unreported.

JURISDICTION

The judgments of the court of appeals were entered on April 4, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2515 of Title 18 of the United States Code provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Section 2518(3) of Title 18 of the United States Code provides in relevant part:

> Upon * * * application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of

a mobile interception device authorized by a Federal court within such jurisdiction) * * *.

Section 2518(10)(a) of Title 18 of the United States Code provides in relevant part:

> Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that—
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval. * * *

STATEMENT

These cases present a clear and expressly recognized circuit conflict on an important question of statutory interpretation. Title III of the Omnibus Crime Control and Safe Streets Act of 1968 authorizes a judge to issue a wiretap order to intercept communications within the court's territorial jurisdiction and provides for suppression of communications intercepted pursuant to a facially insufficient order. The question presented here is whether the statute requires suppression of evidence obtained pursuant to a wiretap order that is facially insufficient because the order exceeds the judge's territorial jurisdiction.

Petitioners moved to suppress wiretap evidence at their criminal trial because the evidence was obtained

pursuant to a series of facially insufficient wiretap orders that authorized interception of communications outside of the issuing court's territorial jurisdiction. The district court denied petitioners' motion to suppress the evidence, App., *infra*, 59a-65a, and petitioners were convicted.

The court of appeals affirmed in relevant part in both petitioners' cases. App., *infra*, 1a-31a, 32a-58a. The court agreed with petitioners that the orders were extraterritorial and thus facially insufficient. *Id.* at 15a-20a. But the court interpreted 18 U.S.C. 2518(10)(a)(ii)—which provides for suppression of an intercepted communication if the authorizing order was "insufficient on its face"—to include an additional, unwritten requirement that, for suppression to occur, the facial insufficiency must result from a statutory violation that implicates a "core concern" underlying Title III. App., *infra*, 21a-22a. The court determined that Title III's territorial-jurisdiction limitation did not implicate a core concern of Congress in enacting the statute, and thus held that evidence obtained pursuant to the facially insufficient orders should not be suppressed. *Id.* at 21a-25a.

In so reasoning, the court of appeals acknowledged the existence of a circuit conflict on the issue whether the territorial-jurisdiction limitation implicates a core concern of Title III. App., *infra*, 21a. The court's decisions in these cases also deepen a circuit conflict on the threshold issue whether an extratextual "core concerns" requirement even applies to motions to suppress facially insufficient Title III wiretap orders. The court of appeals here erred in both respects. Because these cases present an optimal vehicle in which to resolve the conflicts on an important and recurring question of federal law, the petition for a writ of certiorari should be granted.

1. In Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, Congress established a statutory scheme under which courts may authorize governmental interception of wire, oral, and electronic communications in certain carefully delineated circumstances. The purpose of the legislation was "effectively to prohibit, on the pain of criminal and civil penalties, all interceptions of oral and wire communications, except those specifically provided for in [Title III]." *United States* v. *Giordano*, 416 U.S. 505, 514 (1974). To that end, Congress "legislated in considerable detail" concerning who may apply for a wiretap order, what circumstances justify a wiretap order, and what information must appear in the application and the order authorizing the interception. *Id.* at 515; see 18 U.S.C. 2516, 2518.

Title III also imposes limits on judicial authority to approve wiretaps. See 18 U.S.C. 2518(3)-(5). Most pertinent for present purposes, Title III, as amended, permits a judge to authorize interception of communications only "within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction)." 18 U.S.C. 2518(3).

Title III contains a statutorily mandated suppression remedy for violations of its requirements. The statute provides that, "[w]henever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial * * * if the disclosure of that information would be in violation of this chapter." 18 U.S.C. 2515. Title III further provides that an aggrieved person may move to suppress the contents of any communication intercepted pursuant to the statute on

three grounds: "(i) the communication was unlawfully intercepted; (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval." 18 U.S.C. 2518(10)(a).

2. A grand jury in the District of Kansas indicted petitioners, along with 41 other individuals, on various counts arising from an alleged conspiracy to distribute large amounts of marijuana and other drugs. Before trial, petitioners moved to suppress communications intercepted pursuant to nine wiretap orders issued by the United States District Court for the District of Kansas. Those orders authorized the government to intercept communications on mobile telephones used by petitioners and three other individuals. Each wiretap order stated that, "in the event [the target telephone numbers] are transported outside the territorial jurisdiction of the court, interception may take place in any other jurisdiction within the United States." The orders did not require the target phones to be located in Kansas, nor did they require law enforcement officials to maintain their listening post in Kansas. Petitioners argued that the intercepted communications must be suppressed because the orders on their face exceeded the district court's territorial jurisdiction. App., *infra*, 1a-2a, 14a, 33a, 39a-40a, 64a, 66a n.1.

The district court referred the motion to a magistrate judge, who recommended that the court deny petitioners' motion to suppress. App., *infra*, 66a-76a. The magistrate judge believed that the wiretap orders were not improper because, although they "*permitted* interception outside this court's jurisdiction, the government did not actually

intercept cellular communications outside this court's jurisdiction." *Id.* at 72a-73a.

The district court overruled petitioners' objections and adopted the magistrate judge's report and recommendation. App., *infra*, 59a-65a. In particular, the district court noted the magistrate judge's conclusion that the wiretap orders, "as applied," did not violate Title III. *Id.* at 64a.

At trial, evidence from the wiretap orders made up "[m]uch of the evidence" against petitioners. App., *infra*, 14a, 39a. Petitioner Los Dahda was subsequently convicted of 15 counts and sentenced to 189 months of imprisonment. Petitioner Roosevelt Dahda was convicted of 10 counts and sentenced to 201 months of imprisonment.

3. The court of appeals affirmed in relevant part. App., *infra*, 1a-31a, 32a-58a.[1] The court resolved the merits of the wiretap issue in its opinion in petitioner Los Dahda's case, *id.* at 14a-25a, and then relied on that holding to reach the same conclusion in its opinion in petitioner Roosevelt Dahda's case, *id.* at 40a.

a. At the outset, the court of appeals agreed with petitioners that the wiretap orders were facially insufficient because they exceeded the district court's territorial jurisdiction in violation of 18 U.S.C. 2518(3). App., *infra*, 14a-20a. As the court explained, interception occurs "both where the tapped telephones are located and where law enforcement officers put their listening post." *Id.* at 16a-17a. Because the orders at issue "authorized interception of cell phones located outside the issuing court's territorial jurisdiction, using listening posts that were also sta-

[1] Then-Judge Gorsuch participated in the oral argument but not the decisions in these cases. App., *infra*, 1a n.*, 32a n.*.

tioned outside the court's territorial jurisdiction," the orders violated Title III. *Id.* at 17a. The court rejected the government's invocation of the statutory exception for the use of a "mobile interception device," reasoning that the exception covered only cases in which law enforcement was specifically authorized to use a "mobile device for intercepting communications." *Id.* at 20a.[2]

Despite its determination that the wiretap orders were facially insufficient, the court of appeals nevertheless held that the statute did not require suppression of the evidence obtained pursuant to those facially insufficient orders. App., *infra*, 22a-26a. While the court acknowledged that Section 2518(10)(a)(ii) provides for suppression of evidence obtained pursuant to a facially insufficient wiretap order, it asserted that suppression was required only for violation of "those statutory requirements that directly and substantially implement[] the congressional intention to limit the use of intercept procedures." *Id.* at 22a (internal quotation marks and citation omitted).

In applying that additional requirement, the court of appeals relied on its previous decision in *United States* v. *Radcliff*, 331 F.3d 1153 (10th Cir. 2003). App., *infra*, 21a. In *Radcliff*, as in these cases, the Tenth Circuit considered whether evidence obtained pursuant to a facially insufficient wiretap order must be suppressed. See 331 F.3d at 1162. The court of appeals looked to this Court's decisions in *United States* v. *Chavez*, 416 U.S. 562 (1974), and *United States* v. *Giordano*, 416 U.S. 505 (1974), which

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[2] Effectively rejecting the district court's reasoning, the court of appeals noted that, although the calls used at trial were intercepted within the issuing court's territorial jurisdiction, "the orders would have allowed interception of calls outside the issuing court's jurisdiction" and thus were facially insufficient. App., *infra*, 20a & n.7.

considered the suppression remedy in Section 2518(10)(a)(i) for "unlawfully intercepted" communications.

In *Chavez* and *Giordano*, this Court reasoned that not every violation of Title III's requirements results in "unlawful interception" under Section 2518(10)(a)(i), or else the provision would render surplusage the other two provisions in the paragraph (including the provision for cases involving facially insufficient orders). See *Chavez*, 416 U.S. at 575; *Giordano*, 416 U.S. at 525-526. The Court therefore concluded that suppression under Section 2518(10)(a)(i) for "unlawful[] interception" was required only for "failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *Giordano*, 416 U.S. at 527. In *Radcliff*, the Tenth Circuit acknowledged that the Court had articulated that so-called "core concerns" requirement "with respect to motions to suppress under [Section 2518(10)(a)(i)]," but it nevertheless concluded, without explanation, that "th[e] requirement is equally applicable to motions to suppress under [Section] 2518(10)(a)(ii)" as well. 331 F.3d at 1162.

Applying the "core concerns" requirement in these cases, the court of appeals concluded that violation of the territorial-jurisdiction restriction on wiretap orders in Section 2518(3), while rendering the orders facially insufficient, did not require suppression under Section 2518(10)(a)(ii), because "the territorial defect did not directly and substantially affect a congressional intention to limit wiretapping." App., *infra*, 14a. According to the court, the concerns animating Title III were "(1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions

under which the interception of wire and oral communications may be authorized." *Id.* at 21a (quoting S. Rep. No. 1097, 90th Cong., 2d Sess. 66 (1968)).

The court of appeals determined that the privacy concern was not implicated because Section 2518(3)'s territorial-jurisdiction limitation "was not mentioned in the legislative history" of Title III. App., *infra*, 22a. And the court determined that the uniformity concern was not implicated because the territorial-jurisdiction limitation "potentially undermine[s] uniformity by requiring prosecutors in multiple jurisdictions to coordinate about how they use electronic surveillance." *Id.* at 23a. The court of appeals acknowledged that, by concluding that the territorial-jurisdiction did not implicate a "core concern" of Title III warranting suppression, it was creating a conflict with the contrary decision of the District of Columbia Circuit in *United States* v. *Glover*, 736 F.3d 509 (2013). App., *infra*, 21a.[3]

b. Judge Lucero concurred. App., *infra*, 30a-31a. He joined the majority opinion in full, but wrote separately to note that Title III is "in need of congressional attention" to address "[a]dvances in wiretapping technology." *Ibid.*

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[3] The court of appeals rejected petitioner Los Dahda's other challenges to his convictions and sentence; however, the court vacated the fine imposed in light of the government's concession that it exceeded the statutory maximum, and it remanded for imposition of a fine below that maximum. App., *infra*, 29a-30a. Similarly, the court of appeals rejected petitioner Roosevelt Dahda's other challenges to his convictions and forfeiture, but the court vacated his sentence and remanded for resentencing because the district court erred in estimating the quantity of marijuana for which he was responsible. *Id.* at 44a-50a.

REASONS FOR GRANTING THE PETITION

These cases present a straightforward conflict in the courts of appeals on an important and recurring question of statutory interpretation. The Tenth Circuit acknowledged that its decisions in these cases were in direct conflict with a decision of the District of Columbia Circuit on the issue whether Title III's territorial-jurisdiction limitation implicates a "core concern" of the statute, with the result that suppression is warranted when the limitation is violated. The Tenth Circuit's decisions also deepen an antecedent conflict on the issue whether the extratextual "core concerns" requirement even applies to motions to suppress facially insufficient Title III wiretap orders. The Tenth Circuit's decisions cannot be justified under traditional principles of statutory interpretation or by resort to the Court's earlier decisions. These cases present the Court with the opportunity to put a stop to the lower courts' chronic, erroneous interpretation of Title III's suppression remedy. The question presented, moreover, is one of substantial and growing importance. These cases satisfy the criteria for further review, and the petition for certiorari should therefore be granted.

A. The Decisions Below Create A Conflict Among The Courts of Appeals And Deepen A Preexisting Conflict

The Tenth Circuit's decisions in these cases create a conflict among the courts of appeals on the issue whether the territorial-jurisdiction limitation implicates a "core concern" of Title III warranting suppression. The Tenth Circuit expressly recognized the existence of this conflict. App., *infra*, 21a. The decisions below, however, also deepen an existing conflict on the antecedent issue whether the "core concerns" test for suppression even applies to motions to suppress facially insufficient Title III

wiretap orders. Those conflicts warrant this Court's review.

1. As the Tenth Circuit expressly recognized, the decisions below squarely conflict with the decision of the District of Columbia Circuit in *United States* v. *Glover*, 736 F.3d 509 (2013). App., *infra*, 21a. In that case, the Federal Bureau of Investigation (FBI) obtained a wiretap order from a district judge in the District of Columbia to place an audio recording device in the defendant's truck. See 736 F.3d at 510. The government knew that the truck was parked at BWI Marshall Airport, outside the district court's jurisdiction. See *ibid.* The government therefore sought a wiretap order that would permit it to enter the truck regardless of its location. See *ibid.* The order "explicitly stated that FBI agents could forcibly enter the truck, regardless of whether the vehicle was located in the District of Columbia, District of Maryland, or the Eastern District of Virginia." *Ibid.* Because the order authorized placing an interception device on property that was not within the district court's jurisdiction at the time of the order, the D.C. Circuit concluded that the order violated Title III on its face. See *id.* at 514-515.

Turning to the remedy for that violation, the D.C. Circuit rejected the government's argument that the facial insufficiency of the order did not require suppression because Title III's territorial-jurisdiction limitation did not implicate a "core concern" of the statute. 736 F.3d at 515. In addressing that argument, the D.C. Circuit reached two dispositive holdings, both of which conflict with the Tenth Circuit's decisions in these cases: (1) the "core concerns" test does not apply to motions to suppress facially insufficient Title III wiretap orders, see *id.* at 513; and

(2) even if the "core concerns" test did apply, the territorial-jurisdiction limitation implicates a core concern of Title III, see *id.* at 515.

a. The D.C. Circuit first held that the "core concerns" test articulated in *United States* v. *Chavez*, 416 U.S. 562 (1974), and *United States* v. *Giordano*, 416 U.S. 505 (1974), for the "unlawful interception" ground for suppression in Section 2518(10)(a)(i) does not apply to the "facial insufficiency" ground for suppression in Section 2518 (10)(a)(ii). See 736 F.3d at 513. The court observed that the relationship between paragraphs (i) and (ii) of the statute "is, at first glance, rather puzzling," because it would seem that, if an authorization order was "insufficient on its face," the communication would necessarily be "unlawfully intercepted." *Ibid.*

As the court of appeals explained, however, this Court recognized in *Chavez* and *Giordano* that "a broad reading of paragraph (i) would render (ii) and (iii) redundant and 'drained of meaning.'" 736 F.3d at 513 (quoting *Chavez*, 416 U.S. at 575). Therefore, the Court "read paragraph (i) as requiring a broad inquiry into the government's intercept procedures to determine whether the government's actions transgressed the 'core concerns' of the statute, whereas [paragraph] (ii) is a mechanical test; either the warrant is facially insufficient or it is not." *Ibid.* (citing *Giordano*, 416 U.S. at 527). In short, the "core concerns" test "is a construction of the term 'unlawfully intercepted' in paragraph (i), not paragraph (ii)." *Id.* at 515.

Based on the text of Section 2518(10)(a), the D.C. Circuit proceeded to explain that "[s]uppression is the mandatory remedy when evidence is obtained pursuant to a facially insufficient warrant," leaving "no room for judicial discretion." 736 F.3d at 513. The D.C. Circuit reasoned that "applying the 'core concerns' test to paragraph (ii)

would turn the Supreme Court's approach on its head, elevating policy over text." *Ibid.* As the court explained, applying the "core concerns" test to paragraph (ii) "would actually treat that paragraph as 'surplusage'—precisely what the Supreme Court tried to avoid in *Giordano*." *Id.* at 514.

b. The D.C. Circuit next held that, even if an inquiry into the "core concerns" of Title III were required for suppression to occur under Section 2518(10)(a)(ii), "territorial jurisdiction *is* a core concern" of the statute. 736 F.3d at 515.[4] In so holding, the D.C. Circuit expressed agreement with the Fifth Circuit's original decision in *United States* v. *North*, 728 F.3d 429 (2013). In *North*, the Fifth Circuit initially held that the territorial-jurisdiction limitation of Title III implicated a "core concern" of the statute, with the result that evidence obtained pursuant to a facially insufficient wiretap order should be suppressed. But the Fifth Circuit later withdrew its original opinion and replaced it with a new opinion holding that the evidence should be suppressed on other grounds. See 735 F.3d 212, 213 (2013).

Notably, the Fifth Circuit's original opinion largely found its way into the Federal Reporter as Judge DeMoss's concurring opinion to the later decision. See Mike Hurst, *Is The Long Arm of The Law Shrinking?*, 17 Federalist Soc'y Rev. 22, 25 (Feb. 2016). Judge DeMoss would have applied the "core concerns" test to paragraph (ii), but he would have held that "the territorial jurisdiction

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[4] The D.C. Circuit also rejected the argument that the jurisdictional flaw in the order could be "excused as a 'technical defect.'" *Glover*, 736 F.3d at 515. As the court explained, "blatant disregard of a district judge's jurisdictional limitation" cannot be considered merely "technical." *Ibid.*

limitation serves important substantive interests and implicates core concerns of the statute, despite the lack of legislative history." 735 F.3d at 218-219. He reasoned that "Title III's territorial restrictions prevent forum manipulation by law enforcement, similarly preventing wiretap authorizations in cases where investigators would otherwise be able to obtain them," which is "a significant protection of privacy." *Id.* at 219. He therefore would have concluded that "[t]erritorial limitations on a district court directly implicate Congress's intent to guard against the unwarranted use of wiretapping." *Ibid.*

2. The Tenth Circuit's decisions in these cases squarely conflict with both of the D.C. Circuit's holdings in *Glover*. What is more, other courts of appeals have applied the same "core concerns" analysis as the Tenth Circuit.

a. As the D.C. Circuit expressly acknowledged, "a number of [its] sister circuits have imported the core concerns test into paragraph (ii)" and adopted an interpretation that, in the D.C. Circuit's view, was "contrary to the plain text of the statute." *Glover*, 736 F.3d at 513. Six courts of appeals have applied some version of the "core concerns" test to the "facial insufficiency" ground for suppression in Section 2518(10)(a)(ii). See *United States* v. *Robertson*, 504 F.2d 289, 292 (5th Cir. 1974); *United States* v. *Lawson*, 545 F.2d 557, 562 (7th Cir. 1975); *United States* v. *Lomeli*, 676 F.3d 734, 739 (8th Cir. 2012); *United States* v. *Swann*, 526 F.2d 147, 149 (9th Cir. 1975) (per curiam); *Radcliff*, 331 F.3d at 1162; *Adams* v. *Lankford*, 788 F.2d 1493, 1494 (11th Cir. 1986). And three other courts of appeals have likewise held that suppression is not required for every facially insufficient wiretap order. See *United States* v. *Cunningham*, 113 F.3d 289, 293-294 (1st Cir. 1997); *United States* v. *Traitz*, 871 F.2d 368, 379 (3d

Cir. 1989); *United States* v. *Vigi*, 515 F.2d 290, 293 (6th Cir. 1975).

In each of those decisions, the courts of appeals invoked this Court's analysis of Section 2518(10)(a)(i) in *Chavez* or *Giordano* to assess a claim for suppression under Section 2518(10)(a)(ii). See *Lomeli*, 676 F.3d at 739; *Radcliff*, 331 F.3d at 1162; *Cunningham*, 113 F.3d at 293-294; *Traitz*, 871 F.2d at 379; *Adams*, 788 F.2d at 1499; *Lawson*, 545 F.2d at 562; *Swann*, 526 F.2d at 148; *Vigi*, 515 F.2d at 293; *Robertson*, 504 F.2d at 292. That approach directly contravenes the D.C. Circuit's approach in *Glover*, which focused on the plain language of the statute. See 736 F.3d at 513.

b. The Tenth Circuit also created a specific and express conflict with the second holding of the D.C. Circuit's decision in *Glover* when it held that the territorial-jurisdiction limitation in Title III did not implicate a core concern of the statute warranting suppression. App., *infra*, 21a. In support of that specific holding, the Tenth Circuit cited the Eleventh Circuit's decision in *Adams* v. *Lankford*, 788 F.2d 1493 (1986). App., *infra*, 21a. There, the Eleventh Circuit considered whether a violation of Section 2518(3)'s territorial-jurisdiction limitation constituted an error of the magnitude cognizable on a petition for habeas corpus. See 788 F.2d at 1495. Relying on this Court's habeas jurisprudence, the Eleventh Circuit determined that the relevant inquiry was "whether the asserted Title III violations are merely formal or technical errors, or whether the alleged violations implicate the core concerns of Title III." *Id.* at 1497 (citing *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979)); cf. *United States* v. *Nelson*, 837 F.2d 1519, 1527 (11th Cir. 1988) (extending that "core concerns" analysis to direct review).

Like the Tenth Circuit in the decisions below, the Eleventh Circuit looked to Title III's legislative history in deciding that the territorial-jurisdiction limitation did not implicate a core concern of the statute. See *Adams*, 788 F.2d at 1497. The Eleventh Circuit determined that the legislative history was silent "with respect to the connection, if any, between the geographical limitations" on the one hand and "the statute's concern for individual privacy" on the other. *Id.* at 1498. And like the Tenth Circuit, the Eleventh Circuit added that violation of the territorial-jurisdiction limitation actually "alleviate[d] rather than foster[ed] the divergent practices that Congress sought to prevent." *Id.* at 1499.

* * * * *

The courts of appeals are admittedly in conflict regarding the propriety of suppression under Title III. Under the current state of affairs, violation of Title III's territorial-jurisdiction limitation would automatically require suppression of the evidence in the D.C. Circuit, while the evidence would not be suppressed and could be used to convict the defendant in the Tenth Circuit (and likely also the Eleventh Circuit). Moreover, defendants in numerous other circuits must satisfy an additional "core concerns" test before their facially insufficient wiretap orders will result in suppression. The question presented in these cases implicates conflicts among the circuits, and the Court's intervention is warranted to resolve them.

B. The Decisions Below Are Incorrect

The Court's intervention is also warranted because the Tenth Circuit's reasoning is deeply flawed and is inconsistent with the Court's earlier decisions in *Chavez* and

Giordano. In refusing to order suppression of the evidence derived from the facially insufficient wiretap orders, the Tenth Circuit erred in two critical respects.

1. The Tenth Circuit erroneously concluded that evidence derived from a facially insufficient wiretap order can be suppressed under Section 2518(10)(a)(ii) only if the statutory violation "directly and substantially affect[ed] a congressional intention to limit wiretapping." App., *infra*, 14a (internal quotation marks and citation omitted). In *Chavez* and *Giordano*, the Court made clear that this so-called "core concerns" requirement was a construction only of the phrase "unlawfully intercepted" in paragraph (i). See *Glover*, 736 F.3d at 515.

Specifically, in both *Chavez* and *Giordano*, the wiretap orders were facially sufficient; from the face of the applications and orders, they appeared to comply with Title III because they stated that the applications were authorized by an Assistant Attorney General, when in fact they had been authorized by other individuals. See *Chavez*, 416 U.S. at 573-574; *Giordano*, 416 U.S. at 525 n.14. There was thus no basis for suppression under Section 2518 (10)(a)(ii), which applies only to facially insufficient orders. As a result, the question in those cases was whether violation of the statutory requirement regarding who could authorize an application rendered the resulting interceptions "unlawful" under Section 2518(10)(a)(i). See *Chavez*, 416 U.S. at 574; *Giordano*, 416 U.S. at 525.

In addressing that question, the Court recognized the potential for overlap among, and gaps within, the three paragraphs of Section 2518(10)(a). The Court explained that the "unlawful interceptions referred to in paragraph (i) must include some constitutional violations"; suppression for lack of probable cause, for example, is "not provided for in so many words" by paragraphs (ii) and (iii),

and thus must fall within paragraph (i). *Giordano*, 416 U.S. at 525-526. At the same time, however, "paragraphs (ii) and (iii) plainly reach some purely statutory defaults without constitutional overtones, and these omissions cannot be deemed unlawful interceptions under paragraph (i)," or else paragraphs (ii) and (iii) would become surplusage. *Id.* at 526.

The Court ultimately held that "paragraphs (ii) and (iii) must be deemed to provide suppression for failure to observe some statutory requirements that would not render interceptions unlawful under paragraph (i)." *Giordano*, 416 U.S. at 527; see *Chavez*, 416 U.S. at 575. At the same time, however, the Court rejected the government's argument that "no statutory infringements whatsoever are also unlawful interceptions within the meaning of paragraph (i)." *Giordano*, 416 U.S. at 527. Instead, the Court concluded, "Congress intended to require suppression [for 'unlawful interception' under paragraph (i)] where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *Ibid.*

That restriction on paragraph (i)—the so-called "core concerns" test—was developed precisely in order to give meaning to each paragraph of Section 2518(10) and to avoid rendering any of them surplusage. See *Giordano*, 416 U.S. at 525-526. But by applying paragraph (i)'s construction to paragraph (ii), the Tenth Circuit (like many other courts of appeals) has rendered paragraph (ii) entirely superfluous. Limiting suppression for facial insufficiency under paragraph (ii) to situations in which the violated statutory provision "directly and substantially implements" the intent of Congress in enacting Title III as

the Tenth Circuit has done, causes paragraph (ii) to be entirely subsumed within paragraph (i). App., *infra*, 21a. That is because anything that gives rise to suppression under paragraph (ii) necessarily also does so under paragraph (i), turning this Court's analysis in *Chavez* and *Giordano* on its head. See *Glover*, 736 F.3d at 513.

What is more, the Tenth Circuit's approach simply ignores the plain text of the statute. As this Court has repeatedly stated, "in any case of statutory construction, our analysis begins with the language of the statute," and, "where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999) (internal quotation marks omitted). The text of Section 2518(10)(a) establishes that suppression is the remedy where a wiretap order is "insufficient on its face," 18 U.S.C. 2518(10)(a)(ii), regardless of whether the communications were "unlawfully intercepted," 18 U.S.C. 2518(10)(a)(i).

The Tenth Circuit's reasoning negates the suppression requirement that Congress adopted by imposing an additional requirement on defendants, unmoored from the statutory text, before they can receive the remedy to which they are entitled. Judicially fashioned rules for suppression may be permissible when considering the judge-made exclusionary rule under the Fourth Amendment, but courts "must look to the statutory scheme to determine if Congress has provided that suppression is required for [a] particular procedural error" under Title III. *Chavez*, 416 U.S. at 570. Because "the statutory remedy is automatic" under Section 2518(10)(a)(ii), the failure to suppress the fruits of the facially invalid orders was erroneous. *Glover*, 736 F.3d at 516.

2. Moreover, even if the "core concerns" test did apply as a prerequisite to suppression under Section 2518

(10)(a)(ii), the Tenth Circuit erroneously concluded that Title III's territorial-jurisdiction limitation does not implicate the "core concerns" of the statute. Disregard of the territorial-jurisdiction limitation is not a mere technical violation of Title III, but rather a fatal flaw in the warrant. See *Glover*, 736 F.3d at 515.

The Tenth Circuit relied on the supposed dearth of legislative history discussing the territorial-jurisdiction limitation in holding that the limitation did not implicate the "core concerns" of Title III. App., *infra*, 21a-22a. As an initial matter, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). The territorial-jurisdiction limitation is expressly set out in Title III, see 18 U.S.C. 2518(3), and it would be particularly backwards to ignore a requirement in the plain text of a statute simply because the legislative history does not discuss the purposes of the requirement at length.

Further, it makes no sense to conclude that the territorial-jurisdiction limitation does not implicate the "core concerns" of Title III simply because no legislative history addresses it, when jurisdiction is a core concern of our entire judicial system. It is an axiomatic principle in our legal system that courts may act only within their jurisdictions. See, *e.g.*, *United States* v. *Krueger*, 809 F.3d 1109, 1125 (10th Cir. 2015) (Gorsuch, J., concurring) (noting that "our whole legal system is predicated on the notion that good borders make for good government"). Federal district courts possess extraterritorial jurisdiction only in certain exceptional circumstances. See *Weinberg* v. *United States*, 126 F.2d 1004, 1006 (2d Cir. 1942). Accordingly, where a statute fails to contain a territorial lim-

itation, one has been implied. See *ibid.* (noting that a statute authorizing the issuance of search warrants did not expressly limit the district court's powers to its own district, but that limitation "seems clearly understood, in view of the constitutional provisions and the general rule of territorial limitation"); cf. Fed. R. Crim. P. 41(b).

The territorial-jurisdiction limitation also provides a functional safeguard against the overuse of wiretap orders and limits forum shopping by prosecutors seeking wiretap authorization. See *North*, 735 F.3d at 219 (DeMoss, J., specially concurring). The Tenth Circuit reasoned that the territorial-jurisdiction limitation does not prevent forum shopping altogether because the government could still manipulate the system by using a mobile interception device or by using a listening post in the issuing court's district. App., *infra*, 23a-24a. But the court ignored the fact that the property on which a mobile interception device is placed must be located within the issuing court's district when interception is authorized. See *Glover*, 736 F.3d at 514. And forum shopping by relocating a stationary listening post is practically unlikely, because the listening post would have to be manned by agents familiar with the investigation, presumably necessitating the relocation of law enforcement. More broadly, even if the territorial-jurisdiction does not prevent forum shopping altogether, there can be no serious dispute that it limits it.

The Tenth Circuit erred by refusing to impose the statutory suppression remedy under Title III for a facially insufficient wiretap order resulting from violation of the territorial-jurisdiction limitation. This Court should grant review to resolve the circuit conflict on the propriety of suppression and reject the Tenth Circuit's erroneous interpretation.

C. The Question Presented Is An Important And Recurring One That Warrants The Court's Review In These Cases

The question presented, which has caused disuniformity in the circuits, is one of substantial legal and practical importance to the federal criminal system. These cases provide an optimal vehicle for the Court to resolve that question.

1. The question presented—whether Title III requires suppression of evidence obtained pursuant to a wiretap order that is facially insufficient because the order exceeds the judge's territorial jurisdiction—is of immense practical importance for criminal defendants. Wiretap evidence is "one of the most persuasive pieces of evidence that can be presented to a jury." Kyle G. Grimm, *The Expanded Use of Wiretap Evidence in White-Collar Prosecutions*, 33 Pace L. Rev. 1146, 1147 (2013) (Grimm). Such evidence, moreover, is often "crucial to the investigation and prosecution of large criminal conspiracies," like the sprawling conspiracy alleged here. Michael Goldsmith & Kathryn Ogden Balmforth, *The Electronic Surveillance of Privileged Communications: A Conflict in Doctrines*, 64 S. Cal. L. Rev. 903, 906 (1991). Indeed, in the instant cases, the court of appeals observed that "[m]uch of the evidence against [petitioners]" was obtained through wiretap orders that violated the statutory requirement. App., *infra*, 14a; *see id.* at 39a.

The suppression of such crucial evidence should not depend on the vagaries of where defendants are tried. As matters currently stand, defendants are entitled to suppression of evidence obtained through a wiretap order that exceeds the issuing court's territorial jurisdiction in the D.C. Circuit, but not in the Tenth Circuit (and likely

not in the Eleventh Circuit). In fact, with regard to facially insufficient wiretap orders more generally, only defendants in the District of Columbia are automatically entitled to suppression; defendants in most of the regional circuits must satisfy an additional test to obtain suppression. As the court of appeals recognized, however, uniformity across jurisdictions was one of the central concerns motivating Congress in enacting Title III. App., *infra*, 21a (citing S. Rep. No. 1097, 90th Cong., 2d Sess. 66 (1968)). The circuit conflict on the propriety of suppressing the fruits of facially insufficient warrants hardly reflects the nationwide consistency that Congress intended.

Not surprisingly, given the importance of wiretap evidence, law enforcement agencies heavily rely on Title III, the primary federal statute governing the use of wiretaps for criminal investigations. See, *e.g.*, Gina Stevens & Charles Doyle, Congressional Research Service, 7-5700, *Privacy: An Abbreviated Outline of Federal Statutes Governing Wiretapping and Electronic Eavesdropping* 1 (2012). In 2015 alone, law enforcement agencies obtained 4,148 wiretap orders. See United States Courts, *Wiretap Report 2015* (Dec. 31, 2015) <tinyurl.com/wiretap2015> (*Wiretap Report*). The same year, interception orders resulted in 12,923 reported arrests and 5,341 reported convictions. See *id.*, tbls. 8 & 9.

In light of the ubiquity of smartphones and the increased sophistication of wiretapping technology, moreover, the use of wiretaps is only growing: the reported number of authorized wiretap applications increased by 61% from 2001 to 2011. See Grimm 1147. Although Title III was enacted well before the advent of mobile telephones, the vast majority of wiretap orders authorized today target smartphones (whether phone calls, text messages, or other applications). See *Wiretap Report*, *supra*.

And modern technology has drastically simplified the process of wiretapping: the FBI uses a sophisticated surveillance system to intercept communications through a central network, which connects the FBI's regional "wiretapping rooms" to switches operated by major landline, cellular, and Internet companies. Christopher Doval et al., *The Communications Assistance for Law Enforcement Act: An Assessment of Policy Through Cost and Application*, 32 Temp. J. Sci. Tech. & Envtl. L. 155, 168 (2013) (internal quotation marks omitted). Given the substantial and growing use of wiretaps, there can be no serious debate that the question whether to suppress evidence obtained pursuant to a facially insufficient wiretap order will continue to arise.

2. These cases present an ideal vehicle for resolving the question presented. The question was pressed and passed upon below. The court of appeals engaged in an extensive analysis in addressing and resolving the question, which was dispositive of the suppression issue. App., *infra*, 21a-25a. And the court of appeals noted that "[m]uch of the evidence against [petitioners]" was obtained through the challenged wiretap orders, *id.* at 14a; see *id.* at 39a.

As a result of the court of appeals' opinions in these cases, moreover, the arguments on both sides of the circuit conflict have now been fully developed. In his opinion for the D.C. Circuit, Judge Silberman engaged in a similarly extensive analysis of the question presented, considering and rejecting the approach of a "number of our sister circuits" in applying the "core concerns" test to claims for suppression under Section 2518(10)(a)(ii). *Glover*, 736 F.3d at 513-516. The D.C. Circuit's opinion, together with the opinions below (and the Eleventh Circuit's opinion in

Adams, *supra*), comprehensively addresses the arguments on both sides of the conflict.

Finally, there would be little value in allowing the question presented to percolate further. Virtually all of the circuits have addressed the broader question whether suppression is a mandatory remedy for evidence obtained pursuant to a facially insufficient warrant, and those circuits continue to reapply their holdings on that question as the issue recurs. See, *e.g.*, *Cunningham*, 113 F.3d at 294; *Traitz*, 871 F.2d at 376-379; *United States* v. *Acon*, 513 F.2d 513, 516 (3d Cir. 1975); *Robertson*, 504 F.2d at 292; *United States* v. *Gray*, 521 F.3d 514, 527 (6th Cir. 2008); *Vigi*, 515 F.2d at 293; *United States* v. *Fudge*, 325 F.3d 910, 918 (7th Cir. 2003); *Lawson*, 545 F.2d at 562; *Lomeli*, 676 F.3d at 739-741; *United States* v. *Moore*, 41 F.3d 370 (8th Cir. 1994); *United States* v. *Callum*, 410 F.3d 571, 576 (9th Cir. 2005); *Swann*, 526 F.2d at 149; *Radcliff*, 331 F.3d at 1162; *United States* v. *Holden*, 603 Fed. Appx. 744, 749 (11th Cir. 2015) (per curiam), *cert. denied*, 136 S. Ct. 851 (2016); *Adams*, 788 F.2d at 1494; *United States* v. *Scurry*, 821 F.3d 1, 5 (D.C. Cir. 2016); *Glover*, 736 F.3d at 513. The question presented is therefore ripe, and indeed overdue, for the Court's review. Because these cases provide a suitable vehicle in which to resolve the circuit conflict on an important question of federal criminal law, the Court should grant the petition for certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2017

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 15-3226

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

LOS ROVELL DAHDA,
Defendant-Appellant.

April 4, 2017

Before LUCERO and BACHARACH, Circuit Judges.*

OPINION

BACHARACH, Circuit Judge.

Mr. Los Dahda was convicted of crimes growing out of an alleged marijuana distribution network centered in

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* The Honorable Neil Gorsuch participated in the oral argument but not in the decision. The practice of this court permits the remaining two panel judges, if in agreement, to act as a quorum in resolving the appeal. *See* 28 U.S.C. § 46(d); *see also United States v. Wiles*, 106 F.3d 1516, 1516, at n* (10th Cir. 1997) (noting that this court allows remaining panel judges to act as a quorum to resolve an appeal). In this case, the two remaining panel members are in agreement.

Kansas. The convictions resulted in a sentence of imprisonment and a fine of $16,985,250. On appeal, Los[1] presents six challenges to the convictions and sentence:

1. The evidence was insufficient to prove the conspiracy charged in count one.

2. An unconstitutional variance existed between (a) the single, large conspiracy charged in count one and (b) the trial evidence, which showed numerous smaller conspiracies.

3. The district court erred in denying a motion to suppress wiretap evidence because the wiretap authorization orders had allowed law enforcement to use stationary listening posts outside of the issuing court's territorial jurisdiction.

4. The district court failed to instruct the jury that maintenance of drug-involved premises is committed only if storing or distributing drugs constitutes a principal or primary purpose for the defendant's maintenance of the premises.

5. The district court violated the Constitution by sentencing Los to 189 months' imprisonment on count one without a jury finding on the marijuana quantity.

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[1] Mr. Los Dahda had numerous co-defendants, including his brother Mr. Roosevelt Dahda. To avoid confusion between the two brothers, we refer to Mr. Los Dahda by his first name.

6. The district court erred in imposing a $16,985,250 fine.

We reject Los's first five challenges and agree with the sixth challenge. With these conclusions, we affirm the convictions, affirm the sentence of 189 months' imprisonment on count one, and vacate the fine of $16,985,250.

I. The Drug Distribution Network

The charges arose from a large drug-distribution operation that had been manned by over 40 individuals. These individuals obtained marijuana from California and distributed the marijuana in Kansas.

The operation began in 2006 when Mr. Chad Bauman, Mr. Peter Park, and Mr. Wayne Swift began working together to distribute marijuana in Kansas. At first, the individuals obtained their marijuana from Texas and Canada. Eventually, however, the three individuals changed sources and began obtaining their marijuana from California.

Mr. Bauman, Mr. Swift, or another member of the group would drive or fly to California, buy the marijuana, package it, store it in a California warehouse, and ship or drive the marijuana to Kansas.

Los allegedly joined the network as an importer and a dealer. In these roles, Los helped to facilitate the transactions by

- driving money from Kansas to California for someone in the group to buy the marijuana,

• assisting with the purchase and packaging of marijuana in California,

• loading marijuana into crates for shipment to Kansas, and

• selling the marijuana in Kansas to individuals who redistributed the marijuana to others.

The network operated for roughly seven years, but the relationships and work assignments varied over time. For instance, when a dispute arose, Mr. Bauman stopped working with Mr. Park and Mr. Swift. Nonetheless, Los continued to work with Mr. Bauman to acquire marijuana in California and transport the marijuana to Kansas for distribution there. About a year later, Los and Mr. Bauman stopped working together. At that point, Los resumed working with Mr. Park and Mr. Swift as the three individuals continued to acquire marijuana from California and distribute the marijuana in Kansas.

The government began investigating the drug network in 2011. As part of that investigation, the government obtained wiretap authorization orders covering telephones used by suspected members of the network. Ultimately, Los was convicted on 15 counts.

II. Sufficiency of the Evidence

Count 1 charged Los and 42 others with a conspiracy encompassing 1,000 kilograms or more of marijuana. *See* 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(vii), 846, 856; 18 U.S.C.

§ 2.[2] Los argues that the trial evidence established only a series of smaller conspiracies rather than a single conspiracy involving 1,000 kilograms or more of marijuana. We disagree.

To review sufficiency of the evidence, we engage in de novo review, considering the evidence in the light most favorable to the government to determine whether any rational jury could have found guilt beyond a reasonable doubt. *United States v. Yehling*, 456 F.3d 1236, 1240 (10th Cir. 2006). In engaging in this review, we consider all of the evidence, direct and circumstantial, along with reasonable inferences. *Id.* But we do not weigh the evidence or consider the relative credibility of witnesses. *United States v. Wells*, 843 F.3d 1251, 1253 (10th Cir. 2016).

To prove a conspiracy, the government had to show that (1) two or more persons agreed to violate the law, (2) Los knew the essential objectives of the conspiracy, (3) Los knowingly and voluntarily participated in the conspiracy, and (4) the alleged co-conspirators were interdependent. *See United States v. Wardell*, 591 F.3d 1279, 1287 (10th Cir. 2009). Determining the presence of these elements is a factual issue for the jury. *See United States v. Dickey*, 736 F.2d 571, 581 (10th Cir. 1984) ("It is essential to emphasize initially that the question whether there existed evidence sufficient to establish a single conspiracy is one of fact for the jury to decide."). This issue turns here on the existence of a common, illicit goal. *See id.* at 582.

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[2] Count one also charged Los with a conspiracy involving cocaine. *See* 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(ii)(II), 846, 856; 18 U.S.C. § 2. But the cocaine part of the conspiracy was not submitted to the jury.

A. Sufficiency of the Evidence on a Single Conspiracy Involving 1,000 Kilograms or More of Marijuana

The trial evidence was sufficient to show the existence of a single conspiracy involving 1,000 kilograms or more of marijuana. In part, this evidence included testimony by co-defendants Park, Swift, Bauman, Alarcon, Villareal, and Mussat. Their testimony was corroborated by recorded conversations, surveillance, seizures, and business records. Together, this evidence showed that Los and others had traveled to California to purchase marijuana, joined efforts to transport the marijuana to Kansas, and coordinated the delivery of marijuana after returning to Kansas. This evidence was sufficient to show formation of a conspiracy with a common goal between all of the participants to acquire and distribute marijuana. *See United States v. Dickey*, 736 F.2d 571, 582 (10th Cir. 1984); *cf. United States v. Edwards*, 69 F.3d 419, 431 (10th Cir. 1995) (holding that unity of purpose was proven by evidence that the defendants had pooled resources to "periodically travel to Houston to purchase cocaine, and divide the cocaine among the defendants upon return to Tulsa").

Los counters that the government failed to show a single conspiracy because

- the relationships between co-defendants sometimes changed over the course of time and

- the evidence did not show interdependence among co-conspirators.

Both arguments are unavailing.

On the first argument, Los points to a turnover in personnel as the conspiracy progressed. For example, Los, Mr. Park, Mr. Swift, and Mr. Bauman intermittently stopped and resumed doing business with one another, and the suppliers and customers occasionally changed. But changes in a conspiracy's membership do not necessarily convert a single conspiracy into multiple conspiracies. *United States v. Roberts*, 14 F.3d 502, 511 (10th Cir. 1993).

"That some of the participants remained with the enterprise from its inception until it was brought to an end, and others joined or left the scheme as it went along, is of no consequence if each knew he was part of a larger ongoing conspiracy." *United States v. Brewer*, 630 F.2d 795, 800 (10th Cir. 1980). The membership changes would not prevent a reasonable jury from finding Los's unity with others in a scheme to distribute large quantities of marijuana. *See United States v. Dickey*, 736 F.2d 571, 582 (10th Cir. 1984) (numerous marijuana and cocaine transactions over a five-year period with varying participants constituted a single conspiracy).

Second, Los argues that the evidence was insufficient to show interdependence among the co-conspirators. "[I]nterdependence may be shown if a defendant's actions facilitated the endeavors of other alleged co-conspirators or facilitated the venture as a whole." *United States v. Acosta-Gallardo*, 656 F.3d 1109, 1124 (10th Cir. 2011). In our view, the government's evidence was sufficient for a finding of interdependence.

The marijuana network required various individuals to perform different tasks, including growing marijuana

in California, transporting funds to California, buying marijuana in California for distribution in Kansas, transporting the marijuana to Kansas, picking up the marijuana in Kansas, and distributing the marijuana in Kansas. *See United States v. Edwards*, 69 F.3d 419, 431-32 (10th Cir. 1995) (using similar reasoning to conclude that the government had established interdependence); *United States v. Watson*, 594 F.2d 1330, 1340 (10th Cir. 1979) ("Where large quantities of [drugs] are being distributed, each major buyer may be presumed to know that he is part of a wide-ranging venture, the success of which depends on performance by others whose identity he may not even know."). We thus conclude that the evidence established the element of interdependence.

B. Sufficiency of the Evidence on Los's Participation in the Conspiracy

The trial evidence permitted the jury to find not only a single conspiracy involving 1,000 kilograms or more of marijuana but also Los's participation in that conspiracy. For instance, the trial testimony reflected eight facts:

1. Los traveled to California to purchase marijuana from the group's suppliers. R. supp. vol. 1 at 3538, 3687, 4094-97, 4249-50, 4559-60, 5047-50.

2. Large quantities of marijuana were purchased on these trips. *Id.* at 4102, 4348, 5083.

3. Los purchased marijuana in California for transportation to Kansas. *Id.* at 4631, 4639, 4828-29.

4. Los drove money from Kansas to California to purchase marijuana and drove newly acquired

marijuana to the shipping warehouse in California. *Id.* at 3446-47, 4310, 4560-61, 5244-46.

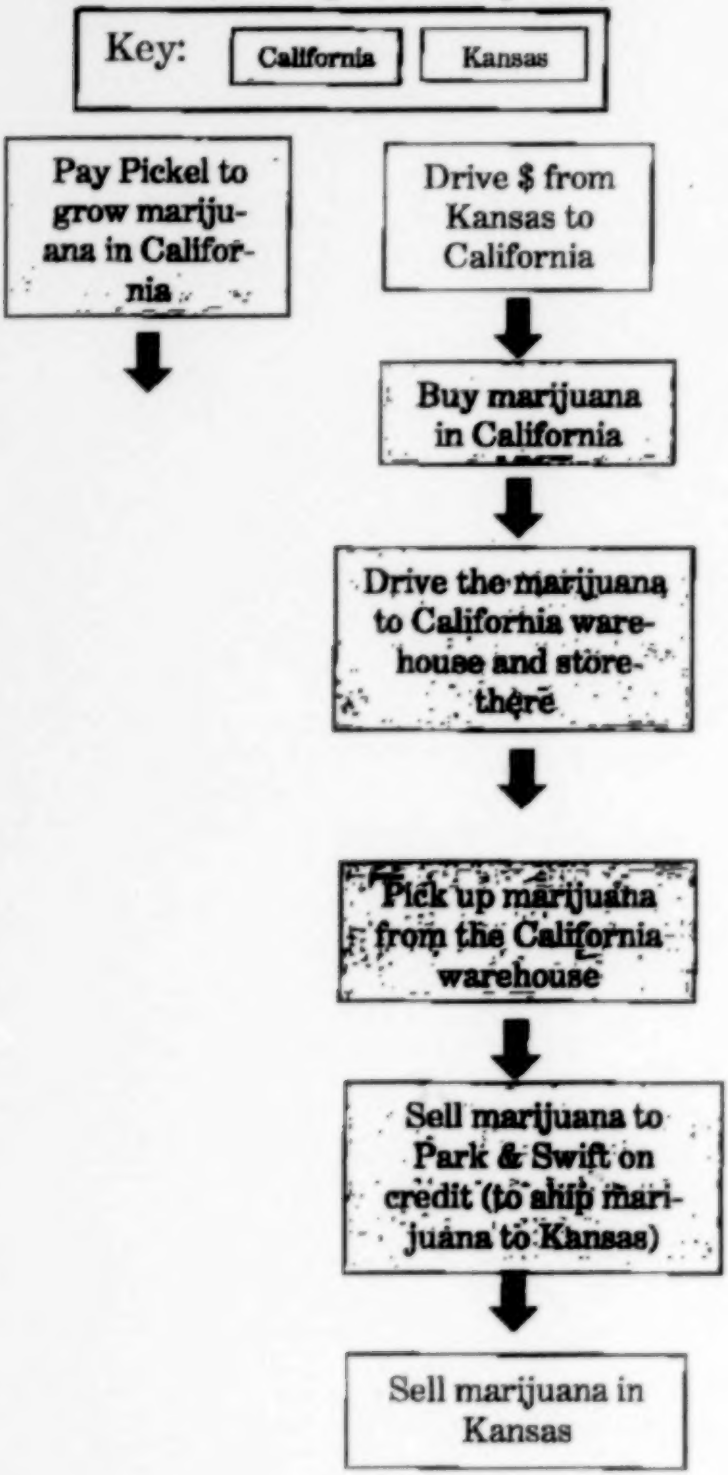
5. Los picked up marijuana that had been stored in the California warehouse. *Id.* at 3306-07, 4260-61.

6. Mr. Park and Mr. Swift helped Los by shipping marijuana from California to Kansas. In return, Los provided marijuana on credit to Mr. Park and Mr. Swift. *Id.* at 4629-30, 4640.

7. Los funded a grow operation in California that was run by a co-defendant, Mr. Justin Pickel. *Id.* at 5232-35. Co-defendants Park and Paiva helped with the grow operation. *Id.* at 5235, 5237, 5241. Approximately 200 marijuana plants were later found at Mr. Pickel's residence. *Id.* at 1960.

8. In Kansas, Los and other co-conspirators sold marijuana to dealers in Kansas for redistribution there. *Id.* at 3285, 4263, 4348.

Los's Contributions to the Global (1,000 Kg+) Conspiracy



Los counters with three arguments:

1. He did not agree to deal cocaine.

2. He did not agree to personally drive large quantities of marijuana.

3. He tried to keep his marijuana separate from the co-defendants' marijuana.

In part, Los contends that he did not share the essential objectives of the charged conspiracy because he did not know that some co-conspirators were also dealing in cocaine. This argument fails because a cocaine conspiracy was never submitted to the jury.

Though count one charged a conspiracy involving cocaine, this part of the conspiracy was not submitted to the jury. Thus, the jury had only to gauge the proof of a conspiracy involving marijuana. That proof was unaffected by the fact that some co-conspirators had also dealt in cocaine. *See United States v. Dickey*, 736 F.2d 571, 582-83 (10th Cir. 1984) (rejecting the argument that a conspiracy involving more than one drug constituted evidence of multiple conspiracies).

Los adds that he "did not want to be involved in large quantities of marijuana." Appellant's Opening Br. at 23. For this argument, Los relies on testimony that he did not want to drive hundreds of pounds of marijuana. R. supp. vol. 1 at 5170-71. But that testimony did not show that Los lacked knowledge of the scope of the marijuana network. To the contrary, the trial evidence showed that Los had known that large quantities of marijuana were being grown and purchased in California and brought to Kan-

sas. Los simply wanted someone else to drive the marijuana because of the risk that the driver would be caught; Los wanted others to bear that risk.

In analogous circumstances, we have recognized the sufficiency of evidence on a large drug conspiracy when various individuals perform assigned tasks involving the transportation and sale of illegal drugs. *See United States v. Evans*, 970 F.2d 663, 673 (10th Cir. 1992). In addition, we have upheld the sufficiency of evidence for particular defendants based on their roles and knowledge of "the nature and objectives of the criminal conspiracy." *United States v. Small*, 423 F.3d 1164, 1184 (10th Cir. 2005); *see also United States v. Vaziri*, 164 F.3d 556, 565 (10th Cir. 1999) ("Generally, it is sufficient for purposes of a single-conspiracy finding that a conspirator knowingly participated with a core conspirator in achieving a common objective with knowledge of the larger venture."). Thus, a reasonable fact-finder could infer that Los shared the conspiratorial objectives.

Finally, Los denies that he and his alleged co-conspirators were interdependent. For this argument, Los points to evidence that he selected his own marijuana and kept track of his own marijuana and money even if they were being shipped with others' marijuana or money. But the jury also heard testimony that (1) Los's marijuana was sometimes combined with marijuana purchased by others and (2) many individuals relied on Los as a supplier. R. supp. vol. 1, at 3653, 4638-39. In addition, the government presented evidence that Los had driven money to California for the group to buy marijuana, had bought the group's marijuana in Kansas, had stored the group's marijuana in a California warehouse, had picked up the group's marijuana from the Kansas warehouse, and had

paid Mr. Pickel to grow marijuana for resale in Kansas. Together, the evidence allowed a jury to reasonably find the element of interdependence.

* * *

In sum, the government presented evidence that Los and others had frequently bought and sold marijuana from one another, worked together to grow marijuana, and united to transport marijuana from California for distribution in Kansas. Viewed in the light most favorable to the government, the evidence was sufficient to establish that Los had joined the single conspiracy charged in count one. We therefore reject Los's challenge to the sufficiency of the evidence regarding a single conspiracy of 1,000 kilograms or more.[3]

III. Variance

Los argues that there was a prejudicial variance between the conduct charged in count one and the trial evidence. According to Los, the evidence established smaller conspiracies rather than a single, large conspiracy.

"In the context of a conspiracy conviction, we treat a variance claim as a challenge to the sufficiency of the evidence establishing that each defendant was a member of the same conspiracy." *United States v. Gallegos*, 784 F.3d 1356, 1362 (10th Cir. 2015). Viewing the challenge in this

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[3] In his reply brief, Los questions the jury instructions and verdict form for count one. But in his opening brief, Los confined his challenge to the sufficiency of the evidence; there was no challenge to the jury instructions or verdict form on count one. These omissions waived the challenges to the jury instructions and verdict form. *United States v. Martinez*, 518 F.3d 763, 767 n.2 (10th Cir. 2008).

manner, we engage in de novo review. *United States v. Caldwell*, 589 F.3d 1323, 1328 (10th Cir. 2009).

For the same reasons discussed above, we reject Los's allegation of a variance between the conspiracy charged in count one and the trial evidence. Accordingly, we affirm Los's conviction on the conspiracy charged in count one.

IV. The Wiretap Authorization Orders

Much of the evidence against Los was obtained through wiretaps of cell phones used by Los and four co-conspirators. The wiretaps grew out of nine orders issued by the U.S. District Court for the District of Kansas.

Prior to trial, Los moved to suppress the intercepted communications, arguing that the wiretap orders exceeded the district court's territorial jurisdiction. We agree with Los that the wiretap orders exceeded the district court's territorial jurisdiction, but we affirm the denial of the motion to suppress because the territorial defect did not directly and substantially affect a congressional intention to limit wiretapping.

A. Standard of Review

We presume that the wiretap authorization orders were valid. *United States v. Radcliff*, 331 F.3d 1153, 1160 (10th Cir. 2003). Los incurred the burden to show otherwise. *Id.* In determining whether Los satisfied this burden, we engage in de novo review. *Id.*

B. Facial Invalidity

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 permits courts to authorize law enforcement's interception of telephone communications. 18 U.S.C. §§ 2510-20. Under Title III, a suppression remedy exists for communications that were intercepted (1) unlawfully, (2) based on a facially insufficient wiretap authorization order, or (3) not in conformity with the wiretap authorization order. 18 U.S.C. § 2518(10)(a). Relying on the second ground for suppression, Los argues that the wiretap authorization orders were facially insufficient because they authorized use of a stationary listening post outside of the district court's territorial jurisdiction. We agree.

Title III permits a judge to authorize "interception" of telephone calls. 18 U.S.C. § 2518(3). Generally, this authority is limited to interceptions taking place within the judge's "territorial jurisdiction." *Id.* But an exception exists, allowing interception outside the judge's territorial jurisdiction when a "mobile interception device" is used. *Id.* Thus, we must decide (1) whether the wiretap orders permitted interception outside the issuing court's territorial jurisdiction, and (2) if so, whether the orders limited extra-territorial interception to instances involving a mobile interception device.

On the first issue, the wiretap orders permitted interception outside of the issuing court's territorial jurisdiction. The wiretap authorization orders provided that "[p]ursuant to Title 18, United States Code § 2518(3), it is further Ordered that, in the event [the target telephone numbers] are transported outside the territorial jurisdiction of the court, interception may take place in any other

jurisdiction within the United States." R. supp. vol. 4 at 166, supp. vol. 5 at 6, 173, 270, 386, 499-500, 638, 766, 915.

The term "intercept" is broadly defined in Title III. This definition includes the use of a "device" to acquire the "contents" of any telephone call. 18 U.S.C. § 2510(4). But "[t]he statute does not specify precisely where an interception is deemed to occur." *United States v. Rodriguez*, 968 F.2d 130, 136 (2d Cir. 1992).

We addressed that issue in *United States v. Tavarez*, 40 F.3d 1136 (10th Cir. 1994). There we interpreted an Oklahoma counterpart to Title III, holding that interception occurs both where the tapped telephone is located and where the intercepted communications are first heard by law enforcement officials. *United States v. Tavarez*, 40 F.3d 1136, 1138 (10th Cir. 1994). That holding was based on the definitions in Oklahoma law for "intercept" and "aural acquisition." *Id.*

Title III's definition of "intercept" is virtually identical to Oklahoma's definition, covering the aural acquisition of the content of any oral communication through a device. 18 U.S.C. § 2510(4). *Compare* Okla. Stat. tit. 13, § 176.2(9), *with* 18 U.S.C. § 2510(4). And the two laws contain similar definitions for "aural" communication. *Compare* Okla. Stat. tit. 13, § 176.2(2) (defining "aural acquisition"), *with* 18 U.S.C. § 2510(18) (defining "aural transfer"). Both definitions would unambiguously include hearing someone's telephone call. *See Sanders v. Robert Bosch Corp.*, 38 F.3d 736, 739 (4th Cir. 1994) ("The recording of a telephone conversation alone constitutes an 'aural . . . acquisition' of that conversation."). Thus, an "interception" under Title III occurs both where the tapped telephones are located and where law enforcement officers put their listening

post. Indeed, every circuit court to address the issue has adopted a similar definition. *See United States v. Jackson*, 849 F.3d 540, 555-56 (3d Cir. 2017).

In this case, the wiretap orders authorized interception of cell phones located outside the issuing court's territorial jurisdiction, using listening posts that were also stationed outside the court's territorial jurisdiction. The orders allowed interception outside the court's territorial jurisdiction because there was no geographic restriction on the locations of either the cell phones or the listening posts. The orders therefore violated the general rule that interception must occur within the issuing court's territorial jurisdiction.

But the statutory exception allows law enforcement to listen to calls outside the issuing court's territorial jurisdiction by using a "mobile interception device." 18 U.S.C. § 2518(3). To determine whether this exception was triggered, we ask whether law enforcement used a "mobile interception device." This question turns on what a "mobile interception device" is.

Three possibilities exist:

1. A listening device that is mobile,[4]

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[4] For example, some scholars point to small mobile devices such as "IMSI catchers," which are capable of intercepting the content from cellphone calls. Gus Hosein & Caroline Wilson Palow, *Modern Safeguards for Modern Surveillance: An Analysis of Innovations in Communications*, 74 Ohio. St. L.J. 1071, 1081 (2013); Stephanie K. Pell & Christopher Soghoian, *Your Secret Stingray's No Secret Anymore: The Vanishing Government Monopoly Over Cell Phone Surveillance & Its Impact on National Security & Consumer Privacy*, 28 Harv. J.L. & Tech. 1, 11 (2014).

2. a cell phone being intercepted, or

3. a device that intercepts mobile communications, such as cellphone calls.

Of the three possibilities, only the first one is compatible with the statute.

The statute's plain language controls unless the plain language would "produce a result demonstrably at odds with the intention of its drafters . . . ." *Starzynski v. Sequoia Forest Indus.*, 72 F.3d 816, 820 (10th Cir. 1995). In examining the meaning of "mobile interception device," we begin with the words' grammatical functions. *See* Antonin Scalia & Bryan A. Garner, *Reading Law* 140 (2012) ("Words are to be given the meaning that proper grammar and usage would assign them.").

The term "mobile" is an adjective, which functions to modify a noun. *See Webster's Third New Int'l Dict.*, 1450 (Gove ed. 1993) (defining an adjective); Bryan A. Garner, *Garner's Dict. of Legal Usage* 23 (3d ed. 2011) (defining a noun). Accordingly, the term "mobile" modifies "interception device" and "the phrase 'mobile interception device' on its face appears to refer to the mobility of the device used to intercept communications." *United States v. North*, 735 F.3d 212, 218 (5th Cir. 2013) (DeMoss, J., concurring opinion).

The second possible interpretation would be to treat the cell phones themselves as "mobile interception devices." This interpretation is impossible to square with Title III. Title III describes the term "device" as something used to intercept a call. 18 U.S.C. § 2510(5). The cell phone is the thing being intercepted, not the thing being used to

intercept the call. Thus, this interpretation is incompatible with Title III.

The third possibility treats a "mobile interception device" as something used to intercept mobile communications. This interpretation would require us to rewrite the statute, creating an entirely different use of the term "mobile."

As discussed above, the statutory term "mobile" precedes two nouns: "interception" and "device." Thus, only three possibilities exist: The term "mobile" can modify (1) "interception," (2) "device," or (3) both "interception" and "device." But the third possible interpretation would ignore all of these possibilities, using "mobile" to modify the noun "telephone." This interpretation does not make sense because the word "telephone" is not included in the phrase "mobile interception device."

This interpretation is based on the Seventh Circuit's opinion in *United States v. Ramirez*, 112 F.3d 849 (7th Cir. 1997). In *Ramirez*, the Seventh Circuit concluded that the term "mobile interception device" includes devices that intercept mobile communications, such as cell phone calls. *Ramirez*, 112 F.3d at 853 ("The term [mobile interception device] in context means a device for intercepting mobile communications . . . ."). There, however, the Seventh Circuit acknowledged that its interpretation deviated from the statutory language. *Id.* at 852. The court recognized that the statutory language, when read literally, would prevent a judge from authorizing interception of cell phone calls through a stationary listening post when both the cell phones and the listening post are located outside of the judge's district. *Id.* at 852.

The Seventh Circuit declined to adopt the literal meaning of the statute, reasoning that the emphasis on the listening post's location "makes very little sense" because "that location is fortuitous from the standpoint of the criminal investigation." *Id.* at 852. The Seventh Circuit then examined Title III's legislative history and concluded that " 'mobile interception device' was intended to carry a broader meaning than the literal one." *Id.* As the Seventh Circuit explained, Title III's legislative history states that the jurisdictional exception for mobile listening devices "applies to both a listening device installed in a vehicle and to a tap placed on a cellular or other telephone installed in a vehicle." *Id.* The Seventh Circuit concluded that (1) this discussion of "mobile interception device" was "illustrative rather than definitional" and (2) when placed in context, the term "mobile interception device" means "a device for intercepting mobile communications." *Id.* at 853.

Even if the legislative history was "illustrative rather than definitional," the illustration underscores the statute's plain language: A bug attached to a car phone is an interception device that is mobile. At a minimum, the legislative history is not demonstrably at odds with a literal interpretation of the statute. Thus, we are not at liberty to scuttle the statute's plain meaning.

Instead, we conclude that the term "mobile interception device" means a mobile device for intercepting communications. The wiretap orders authorized interception of cell phones that were outside of the court's territorial jurisdiction, to be heard with stationary listening posts that could also be positioned outside of the court's jurisdiction. Thus, the orders were facially insufficient under Title III.

C. Suppression as a Remedy

Though the wiretap orders were facially insufficient, the defect does not necessarily require suppression. *See United States v. Foy*, 641 F.3d 455, 463 (10th Cir. 2011) ("Not all deficiencies in wiretap applications . . . warrant suppression."). Rather, suppression is required only if the jurisdictional requirement is one of "those statutory requirements that directly and substantially implement[s] the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *United States v. Giordano*, 416 U.S. 505, 527 (1974); *see United States v. Radcliff*, 331 F.3d 1153, 1162 (10th Cir. 2003) (extending this rule to suppression for facial insufficiency under 18 U.S.C. § 2518(10)(a)(ii)).

Applying this test, we conclude that suppression is not required for the district court's authorization of wiretaps beyond the court's territorial jurisdiction. *See Adams v. Lankford*, 788 F.2d 1493, 1500 (11th Cir. 1986) (holding that authorization of a wiretap order beyond the territorial restrictions in 18 U.S.C. § 2518(3) does not require suppression because the statutory violation would not implicate Congress's core concerns underlying Title III). *But see United States v. Glover*, 736 F.3d 509, 515 (D.C. Cir. 2013) (concluding that territorial jurisdiction is a core concern of Title III).

We begin with the underlying concerns that animate Title III: "(1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." S. Rep. No. 90-1097, at 66 (1968). Los does not explain how

these congressional concerns relate to the statute's territorial limitation.

Congress's goals for Title III included

- protection of the privacy of oral and wire communications and
- establishment of a uniform basis for authorizing the interception of oral and wire communications.

Id.[5] In discussing how the statute protects privacy, the legislative history provides two examples:

1. Limiting who can conduct wiretaps (only "duly authorized law enforcement officers engaged in the investigation or prevention of specified types of serious crimes") and
2. creating an evidentiary burden for a wiretap (probable cause).

Id.

Not surprisingly, the territorial limitation does not appear in the congressional examples of privacy protections in Title III. And the territorial limitation differs from these examples and was not mentioned in the legislative history. *See United States v. Chavez*, 416 U.S. 562, 578 (1974) (relying in part on the absence of legislative history concerning certain Title III provisions to conclude that a statutory violation did not warrant suppression).

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[5] This list of Title III's goals is not exhaustive.

Nor does the territorial requirement implicate the statutory goal of uniformity. Indeed, suppression might actually undermine this goal. In Title III, Congress sought to centralize electronic surveillance decisions with a state's chief prosecuting officer. S. Rep. No. 90-1097, at 98 (1968). But the territorial limitations potentially undermine uniformity by requiring prosecutors in multiple jurisdictions to coordinate about how they use electronic surveillance. *Adams v. Lankford*, 788 F.2d 1493, 1499 (11th Cir. 1986).

Los argues that the territorial limitation thwarts forum shopping, reducing opportunities for the government to manipulate the choice of a forum to obtain warrants that may not be approved elsewhere. *See United States v. North*, 735 F.3d 212, 218-19 (5th Cir. 2013) (DeMoss, J., concurring opinion) (relying on similar reasoning). In our view, however, the territorial limitation does not prevent forum shopping.

As noted above, a judge may authorize a wiretap if (1) the target phone is within the judge's territorial jurisdiction, (2) the government's stationary listening post is located in the judge's territorial jurisdiction, or (3) the government is using an authorized mobile interception device. *See* Part IV(B), above. These statutory predicates permit forum shopping in two ways.

First, if the government wants to seek a wiretap authorization order from a particular court and neither the target phones nor a listening post are located in that court's territorial jurisdiction, the government could forum shop by using an authorized mobile interception device. *See* 18 U.S.C. § 2518(3). In that case, a judge can authorize interception anywhere in the United States simply

by allowing agents to use a mobile device to intercept cell phone calls.

Second, the government can forum shop by using a listening post in the preferred judge's district. As noted above, an interception takes place where the listening post is. *See* Part IV(B), above. And law enforcement has free rein on where to put the listening post. Here, for example, if law enforcement had wanted to obtain a wiretap order from a judge in Nebraska, law enforcement could use a listening post in Nebraska even though none of the underlying events or suspected co-conspirators bore any connection to Nebraska. *See United States v. Jackson*, 207 F.3d 910, 914 (7th Cir.), *overruled on other grounds*, 531 U.S. 953 (2000).[6]

For both reasons, the territorial limitations do not meaningfully curb the danger of forum shopping.[7]

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[6] Los contends that Title III's territorial restriction is designed to ensure a jurisdictional nexus between the issuing court and the telephones to be tapped.

Los cites no authority for this proposition, and it is hard to reconcile with the statute. The statute requires a jurisdictional nexus to either the stationary listening post or to the telephones to be tapped, but not to both. The use of telephones outside of Kansas did not trigger the statute's territorial restriction.

[7] Los does not dispute that for each call used at trial, the agents' listening post was located in the District of Kansas. These cell phone communications were intercepted in the issuing court's territorial jurisdiction, which fell within Title III's territorial limitations. But the orders would have allowed interception of calls outside the issuing court's jurisdiction.

In sum, we hold that the facial defects in the nine wiretap authorization orders did not require suppression. Thus, the district court did not err in denying the motion to suppress.[8]

V. Jury Finding on the Marijuana Quantity

Los was found guilty on count 1, which charged a conspiracy involving 1,000 kilograms or more of marijuana. *See* 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(vii), 846, 856. For this count, Los obtained a sentence of 189 months' imprisonment. He contends that this sentence violates the Constitution because the jury did not specifically find the marijuana quantity involved in the conspiracy.

"We review the legality of an appellant's sentence de novo." *United States v. Jones*, 235 F.3d 1231, 1235 (10th Cir. 2000).

The penalties for violating § 841(a) appear in subsection (b). Subsection (b)(1)(D) provides a maximum sentence of 5 years' imprisonment if the total marijuana weight was less than 50 kilograms. 21 U.S.C. § 841 (b)(1)(D). Subsection (b)(1)(C) provides a maximum sentence of 20 years' imprisonment when no specific amount is charged. And subsections (b)(1)(A) and (B) provide higher maximum sentences depending on the type and quantity of the substance; in cases involving 1,000 kilograms or more of marijuana, subsection (b)(1)(A) imposes

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[8] The government argues that even if the wiretap evidence should have been suppressed, any error in admitting the wiretap evidence would have been harmless because the government proved Los's guilt by overwhelming non-wiretap evidence. We need not reach this argument.

a mandatory minimum sentence of 10 years and a maximum sentence of life imprisonment. 21 U.S.C. § 841(b)(1)(A)(vii).

Although Los was found guilty of participating in a conspiracy involving 1,000 kilograms or more of marijuana, the government agreed to waive the 10-year mandatory minimum under § 841(b)(1)(A). Thus, Los was sentenced under § 841(b)(1)(C).

But he argues that he should have been subject to the 5-year maximum under § 841(b)(1)(D) because the verdict form did not require a specific determination of the marijuana quantity. We reject this argument because the marijuana quantity, 1,000 kilograms, was an element of the charged conspiracy.

Los correctly argues that to increase his maximum sentence based on drug quantity, the quantity of drugs had to be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *United States v. Jones*, 235 F.3d 1231, 1233, 1236 (10th Cir. 2000). Thus, if the jury had not found a marijuana quantity beyond a reasonable doubt, the Constitution would have limited the maximum sentence to five years under § 841(b)(1)(D). *United States v. Cernobyl*, 255 F.3d 1215, 1220 (10th Cir. 2001).

But no constitutional violation took place. On count 1, the jury found that the conspiracy had involved 1,000 kilograms or more of marijuana. Though the quantity was not addressed on the verdict form, the quantity was charged in the indictment and included in Instruction 19: "As to each defendant, to carry its burden of proof on Count 1, the government must prove beyond a reasonable doubt each of the following elements: . . . the overall scope

of the agreement involved more than 1,000 kilograms of marijuana." R. vol. 1 at 401. In turn, the verdict form directed the jury to make its findings on count 1 "[u]nder instructions 19-21." *Id.* at 433.

"We presume the jury follows its instructions" in the absence of an overwhelming probability to the contrary. *United States v. Rogers*, 556 F.3d 1130, 1141 (10th Cir. 2009); *United States v. Herron*, 432 F.3d 1127, 1135 (10th Cir. 2005). There is no reason to think that the jury disregarded its instructions, and we see no reason to reject the presumption here. Thus, we reject Los's challenge to the sentence on count one. *See United States v. Singh*, 532 F.3d 1053 (9th Cir. 2008) (holding that no *Apprendi* violation took place when the burden of proof on a fact, which enhanced the statutory maximum, was contained in a jury instruction but not in the verdict form); *United States v. O'Neel*, 362 F.3d 1310, 1314 (11th Cir. 2004) (same), *vacated sub nom., Sapp v. United States*, 543 U.S. 1107 (2005), *reinstated*, 154 Fed.Appx. 161 (11th Cir. 2005).

VI. Jury Instruction on Maintenance of Premises to Store or Distribute Marijuana

Los was convicted of maintaining premises for the purpose of storing and distributing marijuana. *See* 21 U.S.C. § 856(a)(1)-(2) and 18 U.S.C. § 2. For guilt on maintaining drug-involved premises, the defendant must have "(1) knowingly (2) opened or maintained a place (3) for the purpose of manufacturing by repackaging, distributing, or using any controlled substance." *United States v. Williams*, 923 F.2d 1397, 1403 (10th Cir. 1990).

According to Los, the jury was improperly instructed on the third element. Los contends that the jury should have been told to consider whether storing or distributing

marijuana was the *primary or principal* purpose for maintaining the premise. The government contends that Los failed to preserve this argument, and we agree.

"[W]aiver is the 'intentional relinquishment or abandonment of a known right.' " *United States v. Olano*, 507 U.S. 725, 733 (1992) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Applying this definition, we conclude that Los intentionally relinquished his challenge to the content of the jury instruction. *See United States v. Teague*, 443 F.3d 1310, 1314 (10th Cir. 2006) ("[A] party that has *forfeited* a right by failing to make a proper objection may obtain relief for plain error; but a party that has *waived* a right is not entitled to appellate relief."). This relinquishment constituted a waiver.[9]

At the charging conference, Los represented that he was not challenging the content of the jury instruction. Instead, Los argued that there was not enough evidence to justify this instruction.

As Los points out, the district court initially construed this objection as a challenge to the instruction's content. R. sup. vol. 1 at 5780. But Los immediately clarified: "*I don't want the instruction changed*, I want it omitted because we're making an allegation that there was insufficient evidence to submit it." *Id.* (emphasis added). Based on this exchange, we conclude that Los waived any challenge to the content of the jury instruction. *See United*

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[9] The government urged forfeiture rather than waiver. But we may consider the issue of waiver sua sponte. *United States v. Mancera-Perez*, 505 F.3d 1054, 1057 n.3 (10th Cir. 2007).

States v. Carrasco-Salazar, 494 F.3d 1270, 1272-73 (10th Cir. 2007) ("[A]n abandoned objection is waived.").

We accordingly decline to consider Los's challenge to the content of the jury instruction.

VII. Fine

Finally, Los challenges the $16,985,250 fine as procedurally and substantively unreasonable. The government does not address these challenges, but concedes that the fine was erroneous because it exceeded the statutory maximum. We agree with this concession. Los was subject to a fine on 15 counts; for these counts, the maximum fine would have been $13,750,000.[10] As a result, we reverse the

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[10] The government explained:

> As to Count One, 21 U.S.C. § 841(b)(1)(A) carries a maximum fine of $10,000,000.00 if the defendant is an individual. The maximum fine is $20,000,000 if the individual has a prior felony drug conviction, which is not applicable here. 21 U.S.C. § 841(b)(1)(A). As to Counts 26, 36, 43, 49, 73, 85, and 88, the maximum fine on each count is $250,000. 21 U.S.C. § 841(b)(1)(D). Count 31 carries a maximum fine of $500,000. 21 U.S.C. § 856(b). As to Counts 38, 39, 41, 42, 45, and 46, the maximum fine on each count is $250,000. 21 U.S.C. § 843(b); 18 U.S.C. § 3571. (*See also* Vol. 2, Doc. 2049, PSR ¶ 473.) Aggregating all of the maximum fines on each count of conviction results in a total potential maximum fine of $13,750,000.00.

Appellee's Response Br. at 57 n.24.

district court's imposition of the fine and remand for reconsideration of the amount.[11]

VIII. Disposition

We affirm Los's convictions and sentence of 189 months' imprisonment on count 1. We reverse the imposition of a fine in the amount of $16,985,250 and remand for reconsideration of the amount.

LUCERO, J., concurring.

I join the majority opinion in full. I write separately to note that 18 U.S.C. § 2518(3) is in need of congressional attention. Both the terminology and the mechanisms for intercepting calls have bypassed the quaint language of this statute.

Section 2518(3) empowers judges to authorize the interception of "electronic communications within the territorial jurisdiction of the court in which the judge is sitting." Id. Judges may also authorize interception "outside that jurisdiction but within the United States in the case of a mobile interception device." Id. The congressional discussion of this provision, which like the statute appears trapped in history, suggests that the phrase "mobile interception device" would apply "to both a listening device installed in a vehicle and to a tap placed on a cellular or other telephone instrument installed in a vehicle." S. Rep. No. 99-541, at 30 (1986), as reprinted in 1986 U.S.C.C.A.N. 3555, 3584.

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[11] We express no opinion on Los's arguments of procedural and substantive reasonableness.

It seems that Congress intended to cover situations in which a phone being monitored under a wiretap order leaves the original jurisdiction. But in crafting language to deal with this contingency, Congress presumed that authorities would have to install a physical device to monitor calls. See id. (discussing two hypotheticals, one in which a judge "authorize[s] the installation of a device and the device will be installed within the court's jurisdiction, but the suspect will subsequently move outside that jurisdiction," and one in which "a device [is] authorized for installation in an automobile" but the vehicle is "moved to another district prior to installation"). Advances in wiretapping technology have rendered that presumption inaccurate. Mobile phone calls may now be monitored without a device located in close physical proximity to the phone.

Nevertheless, I agree with the majority opinion that we should not torture this statutory text to apply to all calls placed from a mobile phone. It is for Congress to update § 2518(3) to account for modern devices if it so chooses.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 15-3237

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

ROOSEVELT RICO DAHDA,
Defendant-Appellant.

April 4, 2017

Before LUCERO and BACHARACH, Circuit Judges.*

OPINION

BACHARACH, Circuit Judge.

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* The Honorable Neil Gorsuch participated in oral argument, but he is not participating in the decision. The practice of this court permits the remaining two panel judges, if in agreement, to act as a quorum in deciding the appeal. *See* 28 U.S.C. § 46(d); *see also United States v. Wiles*, 106 F.3d 1516, 1516, at n* (10th Cir. 1997) (noting that this court allows remaining panel judges to act as a quorum to decide an appeal). In this case, the two remaining panel members are in agreement.

Mr. Roosevelt Dahda and 42 others faced criminal charges involving the operation of a marijuana-distribution network centered in Kansas. Roosevelt[1] was convicted on ten counts, and the district court sentenced him to 201 months' imprisonment and ordered forfeiture in the amount of $16,985,250. On appeal, Roosevelt raises seven challenges to the convictions and sentence:

1. The evidence was insufficient to prove the conspiracy charged in count one, which involved 1,000 kilograms or more of marijuana.

2. There was an unconstitutional variance between the single, large conspiracy charged in count one and the trial evidence, which showed numerous smaller conspiracies.

3. The district court erred in denying Roosevelt's motion to suppress wiretap evidence.

4. The sentence of 201 months' imprisonment exceeded the statutory maximum because the jury did not make a specific finding on the quantity of marijuana involved in the conspiracy.

5. The district court erred in setting Roosevelt's base-offense level by miscalculating the amount of marijuana attributed to Roosevelt.

6. The district court's upward variance of 33 months was substantively unreasonable.

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[1] One of the co-defendants was Roosevelt's brother, Mr. Los Dahda. To avoid confusion, we refer to Mr. Roosevelt Dahda and Mr. Los Dahda by their first names.

7. The district court erred in entering a forfeiture judgment.

We reject the challenges in 1-4 and 6-7. But we agree with the fifth challenge, concluding that the district court miscalculated the amount of marijuana attributed to Roosevelt. Based on these conclusions, we affirm Roosevelt's convictions but remand for resentencing.

I. Sufficiency of the Evidence

Count one charged Roosevelt with a conspiracy involving 1,000 kilograms or more of marijuana. *See* 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(vii), 846, 856 (2012); 18 U.S.C. § 2.[2] Roosevelt argues that the government failed to prove that he had joined the large conspiracy charged in count one. According to Roosevelt, the evidence established only a number of smaller conspiracies.

To decide whether the evidence of guilt sufficed, we engage in de novo review, considering the evidence in the light most favorable to the government to determine whether any rational jury could have found guilt beyond a reasonable doubt. *United States v. Yehling*, 456 F.3d 1236, 1240 (10th Cir. 2006). We consider the direct and circumstantial evidence but do not balance conflicting evidence or consider the witnesses' credibility. *Id.*

To prove a conspiracy, the government must show that (1) two or more persons agreed to violate the law, (2) the defendant knew the essential objectives of the conspiracy,

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[2] Count one also charged Roosevelt with a conspiracy involving cocaine. *See* 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(ii)(II), 846, 856; 18 U.S.C. § 2. But the cocaine component of the conspiracy was not submitted to the jury.

(3) the defendant knowingly and voluntarily participated in the conspiracy, and (4) the alleged co-conspirators were interdependent. *United States v. Wardell*, 591 F.3d 1279, 1287 (10th Cir. 2009). Determining the existence of a single conspiracy involves a question of fact for the jury. *United States v. Dickey*, 736 F.2d 571, 581 (10th Cir. 1984). This question turns on the existence of a common, illicit goal. *Id.* at 582.

Based on the trial evidence, we concluded in *United States v. Los Dahda* that the evidence was sufficient to permit the finding of a single conspiracy of 1,000 kilograms or more of marijuana.[3] 853 F.3d 1101, 1107-08 (10th Cir. 2017). Applying the same reasoning here, we reject Roosevelt's argument that the evidence established a number of smaller conspiracies rather than a single large conspiracy.

The remaining question is whether the evidence was sufficient to show that Roosevelt joined the large conspiracy involving 1,000 kilograms or more of marijuana. We conclude that the evidence was sufficient based on six categories of evidence:

1. Roosevelt drove a truck with a hidden compartment, which was used by the group to transport drugs and cash. R. vol. 1, at 406-08; R. supp. vol. 4,

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[3] Roosevelt raises one argument not raised in Los's appeal: that Mr. Park and Mr. Swift "may have been in direct competition with [Mr. Bauman] at some points." Appellant's Opening Br. at 34. In support, Roosevelt points to Mr. Park's testimony that an individual working with Mr. Bauman might have stolen marijuana from Mr. Park's store. R. vol. 3, at 1453. This testimony is not dispositive, and Mr. Bauman and Mr. Swift testified that they had never competed with one another. R. vol. 3, at 1182, 2351. Thus, we reject Roosevelt's argument.

Exhibit 704-05. When Roosevelt drove the truck, the hidden compartment apparently contained cash. Once Roosevelt arrived in California, he was to open the compartment to remove the cash. *Id.*

2. Roosevelt relayed a request from Mr. Park for Los to travel to Northern California to inspect some marijuana grow operations. R. vol. 2, at 575; R. supp. vol. 4, Exhibit 823. In relaying this request, Roosevelt commented that he had seen some of the marijuana and that it "look[ed] very lovely." R. supp. vol. 4, Exhibit 823.

3. Roosevelt sent boxes through the group's shipping operation to Mr. Justin Pickel, who grew marijuana in California. R. vol. 1, at 474; R. supp. vol. 4, Exhibit 753. Roosevelt also agreed to send money to Mr. Pickel. R. vol. 2, at 547-48; R. supp. vol. 4, Exhibit 794.

4. Roosevelt went to the group's Kansas warehouse to pick up marijuana. R. vol. 3, at 1457-58.

5. In Kansas, Roosevelt sold pounds of marijuana that had been sent from California, R. vol. 3 at 1231-50, 1260-62, 1293-95, 1606-07, 1612; R. supp. vol. 4, Exhibits 738, 767, 772-74, 853-54.

6. The day after the police seized approximately 37 pounds of marijuana from Mr. Pickel, Roosevelt and Los discussed the fact that they had lost "half of what [they] [had] worked for" and that they had to be cautious when "bring[ing] the rest of this back." R. supp. vol. 4, Exhibit 860.

Crediting this evidence and viewing it favorably to the government, we conclude that a rational fact-finder could conclude beyond a reasonable doubt that Roosevelt knowingly and voluntarily participated in the large conspiracy. This conclusion would have remained valid even if Roosevelt had occupied a relatively minor role in the conspiracy. *See United States v. Caro*, 965 F.2d 1548, 1556 (10th Cir. 1992) ("[A] defendant's participation in the conspiracy may be slight and may be inferred from the defendant's actions so long as the evidence establishes a connection to the conspiracy beyond a reasonable doubt."). In *United States v. Anaya*, for instance, the defendant participated in a drug conspiracy only by installing hidden compartments in vehicles. 727 F.3d 1043, 1051 (10th Cir. 2013). We held that the evidence was sufficient for conviction on a conspiracy charge because the compartments had been insulated to mask smells, the defendant had seen $800,000 in cash in one of the compartments, the compartments' sizes had been measured in kilos, the defendant and his customers had communicated in code, and the defendant had been warned not to discuss the compartments. *Id.*

Similarly, Roosevelt might not have performed a major role in the conspiracy. But the trial evidence was sufficient to show that he (1) had agreed to violate the law, (2) had known that the essential objective of the conspiracy was transportation of marijuana from California to Kansas for resale in Kansas, (3) had knowingly and voluntarily participated in the conspiracy, and (4) had facilitated the conspiracy's objective.

Roosevelt counters that the government did not prove interdependence because he was unknown to several co-

conspirators and the conspiracy could have operated without him. These arguments overstate what the government had to prove. The government did not need to prove

- that Roosevelt knew or had connections with all other members of the conspiracy or

- that Roosevelt was indispensable to the conspiracy.

See United States v. Foy, 641 F.3d 455, 465 (10th Cir. 2011). "[R]ather, it is sufficient that [Roosevelt] was an operational link within [the conspiracy]." *United States v. Cornelius*, 696 F.3d 1307, 1318 (10th Cir. 2012). In light of the evidence, we conclude that the evidence sufficed for a finding that Roosevelt had at least been "an operational link" within the conspiracy. *Id.*

* * *

Viewed in the light most favorable to the government, the evidence was sufficient to establish (1) the existence of the single conspiracy charged in count one and (2) Roosevelt's participation in that conspiracy. We therefore reject Roosevelt's challenge to the sufficiency of the evidence on count one.

II. Variance

Roosevelt also urges a prejudicial variance between the conduct charged in count one and the trial evidence. According to Roosevelt, the evidence established only

smaller conspiracies rather than a single, large conspiracy.[4]

"In the context of a conspiracy conviction, we treat a variance claim as a challenge to the sufficiency of the evidence establishing that each defendant was a member of the same conspiracy." *United States v. Gallegos*, 784 F.3d 1356, 1362 (10th Cir. 2015). Viewing the challenge in this manner, we engage in de novo review. *United States v. Caldwell*, 589 F.3d 1323, 1328 (10th Cir. 2009).

Applying de novo review, we rejected the same challenge by Roosevelt's co-defendant in *United States v. Los Dahda*, 853 F.3d 1101, 1111 (10th Cir. 2017). Based on that opinion, we reject Roosevelt's assertion of a variance between count one and the trial evidence.

III. The Wiretap Authorization Orders

Much of the evidence introduced against Roosevelt was obtained through wiretaps of cell phones used by Roosevelt and four others. The wiretaps took place during the six months preceding Roosevelt's arrest and had been authorized by the U.S. District Court for the District of Kansas. Prior to trial, Roosevelt moved to suppress the

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[4] Roosevelt made a different variance argument in district court. There, Roosevelt argued that a variance had occurred because (1) the charge involved both cocaine and marijuana and (2) the trial evidence proved only a marijuana conspiracy. The government argues that we should apply plain-error review to the new variance argument raised on appeal. Because we would affirm even under de novo review, we do not consider whether the plain-error standard applies. *See United States v. Vasquez-Alcarez*, 647 F.3d 973, 977 (10th Cir. 2011) (permitting us to assume, for the sake of argument, that an argument was not forfeited).

intercepted communications, arguing that the wiretap orders were facially insufficient because they had exceeded the district court's territorial jurisdiction.

We concluded in *United States v. Los Dahda* that suppression was not warranted even though the orders had been facially deficient. 853 F.3d 1101, 1111-16 (10th Cir. 2017). Based on our opinion in *Los Dahda*, we reject Roosevelt's challenge to the denial of his motion to suppress.

IV. Sentencing Issues

Roosevelt was sentenced to prison for a total of 201 months. In calculating the sentence, the district court determined that Roosevelt was responsible for 1,600 pounds (725.7 kilograms) of marijuana, resulting in a base-offense level of 28. *See* U.S.S.G. § 2D1.1 (2014). With adjustments and criminal history, the guideline range was 135 to 168 months. The district court then varied upward by 33 months on the ground that Roosevelt had manipulated a co-defendant into not cooperating with the government.

Roosevelt urges a remand for resentencing based on three arguments:

1. The sentence exceeded the statutory maximum because the jury did not specifically find the quantity of marijuana involved in the conspiracy.

2. The district court clearly erred in finding that Roosevelt was responsible for 1,600 pounds of marijuana.

3. The upward variance was substantively unreasonable because Roosevelt did not manipulate the co-defendant.

We reject the first and third arguments but agree with the second. Because the district court erred in attributing 1,600 pounds to Roosevelt, we remand for resentencing.

A. Jury Finding on Marijuana Quantity

As noted, Roosevelt was found guilty on count one, participation in a conspiracy involving 1,000 kilograms or more of marijuana. Roosevelt argues that the prison sentence of 201 months on count one exceeds the statutory maximum because the jury did not specifically find the quantity of marijuana involved in the conspiracy.

The penalties for violating 21 U.S.C. § 841(a) are set forth in subsection (b). The severity of the penalty turns on the quantity of drugs involved in the crime. Subsection (b)(1)(D) provides a ceiling of five years' imprisonment for less than 50 kilograms of marijuana. 21 U.S.C. § 841 (b)(1)(D). Subsection (b)(1)(C) provides a maximum sentence of 20 years' imprisonment when no specific quantity is charged. And subsections (b)(1)(A) and (B) provide even higher maximum sentences and mandatory minimums, depending on the type and quantity of the substance. In cases involving at least 1,000 kilograms or more of marijuana, subsection (b)(1)(A) imposes a mandatory minimum sentence of ten years and a maximum sentence of life imprisonment. 21 U.S.C. § 841(b)(1)(A)(vii).

Roosevelt was sentenced under subsection (b)(1)(C),[5] but he argues that he should have been sentenced under

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[5] Although Roosevelt was found guilty of participating in a conspiracy involving 1,000 kilograms or more of marijuana, the government agreed to waive the ten-year mandatory minimum under § 841(b)(1)(A).

(b)(1)(D) because the verdict form had not included a specific finding on the marijuana quantity. But Roosevelt waived this argument in district court.

When the district court asked Roosevelt's attorney which subsection applied, the attorney responded:

> Your Honor, I would agree that (b)(1)(C) is the appropriate provision under Section 841 as regards to the defendant's sentencing range and that's because the jury did not find the quantity of drugs necessary to trigger any mandatory minimum that's based on quantity, and (b)(1)(A) and (b)(1)(B) are based on quantities. (b)(1)(C) states that for any substance under Schedule 1 or Schedule 2. It doesn't have a quantity.
>
> And I think there's case law in the Tenth Circuit that says that that provision applies in the absence of any quantity found by the jury. And so we would argue that (b)(1)(C) applies as the defendant's statutory range which has no mandatory minimum and has the maximum of 20 years.

R. vol. 3 at 2648-49.

The threshold issue is whether defense counsel's statement constitutes a waiver, which would arise if the statement had "invited" the alleged error. *United States v. Carrasco-Salazar*, 494 F.3d 1270, 1272 (10th Cir. 2007); *see also United States v. Olano*, 507 U.S. 725, 733 (1992) ("[W]aiver is the intentional relinquishment or abandonment of a known right." (citations & internal quotation marks omitted)). We conclude that defense counsel waived the present argument.

When asked which statutory provision should apply, defense counsel stated that Roosevelt should be sentenced under § 841(b)(1)(C); and the district court relied on this representation. These circumstances constitute invited error. *See United States v. Teague*, 443 F.3d 1310, 1316 (10th Cir. 2006) (rejecting the defendant's challenge to the conditions of his supervised release because he "proposed the very limitation . . . to which [he] now objects").

Roosevelt disagrees, contending that the discussion at sentencing focused on whether a statutory mandatory minimum could be imposed given the lack of a specific finding on the marijuana quantity. The issue on appeal, he explains, is whether the sentence exceeded the statutory maximum given the lack of a jury finding on quantity. We disagree, for Roosevelt expressly agreed that the statutory maximum was provided in (b)(1)(C).

But even if Roosevelt had not invited error in district court, we would reject the argument under the plain-error standard. We find plain error when (1) the ruling constitutes error, (2) the error is plain, (3) the error affects substantial rights, and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Romero*, 491 F.3d 1173, 1178 (10th Cir. 2007).

In *United States v. Los Dahda*, we addressed whether the lack of an express jury finding on quantity required resentencing of Los under 21 U.S.C. § 841(b)(1)(D), rather than § 841(b)(1)(C). 853 F.3d 1101, 1116-17 (10th Cir. 2017). Under de novo review, we concluded that the answer was "no" because the quantity of 1,000 kilograms constituted an element of the charged conspiracy. *Id.*

The same reasoning applies here. Using the same instructions and verdict form described in *Los Dahda*, the jury found Roosevelt guilty on count one, which required the jury to find that the conspiracy involved 1,000 kilograms or more of marijuana. Therefore, Roosevelt's sentence under 21 U.S.C. § 841(b)(1)(C) did not constitute error, much less plain error. *See id.*

In sum, Roosevelt waived his challenge to the statutory maximum. But even if this issue had not been waived, application of § 841(b)(1)(C) would not have constituted plain error.

B. Quantity of Marijuana Attributable to Roosevelt

Roosevelt contends that in calculating his base-offense level, the district court erroneously calculated the quantity of drugs attributable to him. The district court adopted the presentence report's recommendation, which attributed 1,600 pounds (725.7 kilograms) of marijuana to Roosevelt. This quantity involved an estimate of the weight of marijuana shipped from California to Kansas between December 2010 and May 2012.[6] During this time-period, the presentence report estimated that 20 pallets, each containing 80 pounds of marijuana, had been shipped from California to Kansas—for a total of 1,600 pounds. R. vol. 4, at 49-50. The district court determined that this estimate had been "reasonable and reliable and conservative," resulting in a base-offense level of 28. R. vol. 3, at 2668.

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[6] These dates were selected because Roosevelt had been in prison through November 2010 and was arrested on the present charges in May 2012.

Roosevelt argues that (1) he was pinned with marijuana shipments that he could not have reasonably foreseen and (2) even if the shipments had been reasonably foreseeable, the district court clearly erred in estimating that each pallet contained 80 pounds of marijuana.[7] We reject Roosevelt's first argument but agree that the court clearly erred in estimating that each pallet contained 80 pounds of marijuana. Accordingly, we remand for resentencing.

1. Reasonable Foreseeability

A defendant is accountable for all reasonably foreseeable drug quantities that were within the scope of the jointly undertaken criminal activity. U.S.S.G. § 1B1.3 cmt. 2 (2014).

"We review the district court's factual finding concerning the quantity of drugs for which a defendant may be held accountable under a clearly erroneous standard."

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[7] At oral argument, Roosevelt argued for the first time that the jury should have determined the quantity of marijuana used to calculate the base-offense level. But "[i]ssues raised for the first time at oral argument are considered waived." *Fed. Ins. Co. v. Tri-State Ins. Co.*, 157 F.3d 800, 805 (10th Cir. 1998).

Even if we were to consider the argument, it would fail on the merits. The jury's findings on count one resulted in a statutory maximum of 20 years' imprisonment. *See* Part IV(A), above. If the drug quantity found by the sentencing judge "did not cause [the defendant's] sentence to exceed the statutory maximum, *Apprendi* [*v. New Jersey*, 530 U.S. 466 (2000)] [would] not require that the jury make findings on quantity." *United States v. Wilson*, 244 F.3d 1208, 1215 (10th Cir. 2001). Here, the 1,600 pounds of marijuana attributed to Roosevelt did not cause his sentence to exceed the statutory maximum that would otherwise have existed. Accordingly, there was no *Apprendi* violation.

United States v. Ortiz, 993 F.2d 204, 209 (10th Cir. 1993). The finding is clearly erroneous only if it is implausible or impermissible based on the entire record. *United States v. Torres*, 53 F.3d 1129, 1144 (10th Cir. 1995). In examining the record, we must determine whether the district court could reasonably have found that the government had satisfied its burden on foreseeability by a preponderance of the evidence. *United States v. Roberts*, 14 F.3d 502, 521 (10th Cir. 1993).

Roosevelt contends that he cannot be held responsible for the first five shipments listed in the presentence report—representing 1,040 pounds of marijuana—because (1) these shipments were received by Mr. Bauman and (2) Roosevelt did not work with Mr. Bauman. As previously noted, Roosevelt's lack of a direct connection with Mr. Bauman would not preclude responsibility for the five shipments. *See* Part I, above. And the evidence showed that beginning in early 2011, Roosevelt was selling marijuana in Kansas that had been acquired in California. R. vol. 3, at 1231-50, 1260-62.

Roosevelt also argues that he was not personally linked to any of the shipments. But Roosevelt could be responsible for shipments even if he was not personally linked to them. "Section 1B1.3(a)(1)(B) makes clear that in calculating a defendant's offense level under the Guidelines, a defendant must be held accountable for the conduct of his co-conspirators, including conduct in which the defendant did not personally participate, as long as the conduct was within the scope of the jointly undertaken criminal activity and was reasonably foreseeable to the defendant." *United States v. Sells*, 541 F.3d 1227, 1235 (10th Cir. 2008).

In *United States v. Williams*, we upheld a defendant's base-offense level predicated on the entire quantity of drugs involved in the conspiracy. 897 F.2d 1034, 1041 (10th Cir. 1990). We agreed with the sentencing court that "at a minimum" the defendant "had knowledge of the criminal enterprise" and participated significantly (though only episodically). *Id.* Thus, the defendant "knew or should have known" of the total quantity of drugs involved in the conspiracy. *Id.*

Our explanation in *Williams* is also applicable here. Roosevelt was aware of the drug distribution network and participated in that network. This participation included driving cash to California for someone in the group to buy marijuana, examining a field of marijuana, picking up marijuana shipments at the group's Kansas warehouse, and selling marijuana in Kansas. *See* Part I, above. Nonetheless, the district court did not pin Roosevelt with all of the drugs involved in the conspiracy; instead, the court excluded marijuana that had been dealt while Roosevelt was in prison. Thus, the district court did not clearly err in finding that the marijuana shipments had been reasonably foreseeable and within the scope of the criminal activity undertaken by Roosevelt.

2. Estimate of Marijuana Quantity

Roosevelt also argues that the district court clearly erred in estimating that each of the 20 shipped pallets contained 80 pounds of marijuana. We agree with Roosevelt.

The government bears the burden to prove drug quantity through a preponderance of the evidence. *United States v. Ortiz*, 993 F.2d 204, 209 (10th Cir. 1993). The base-offense level may consist of an estimate if it contains some record support and is based on information bearing

"minimum indicia of reliability." *United States v. Garcia*, 994 F.2d 1499, 1508 (10th Cir. 1993); *United States v. Coleman*, 7 F.3d 1500, 1504 (10th Cir. 1993).

No such indicia of reliability are present here. The quantities in the pallets varied. For example, Mr. Bauman testified that each pallet had contained between "five or ten pounds to eighty pounds" of marijuana. R. vol. 3, at 2251. Mr. Bauman and Mr. Swift remarked that toward the end of the conspiracy, each pallet usually contained 80 pounds, with Mr. Bauman adding that there "could have been" times when the pallets contained more than 80 pounds. R. vol. 3, at 1067, 2252. But this testimony does not support a finding that the pallets contained an average of 80 pounds. In fact, the presentence report states that one of the shipments attributed to Roosevelt had contained only 33 pounds of marijuana. R. vol. 4 at 49.

The government cites no evidence showing that the district court fairly attributed 80 pounds, rather than 5-10 pounds, to the shipments used to calculate Roosevelt's base-offense level. Nor is there any way to determine what time period Mr. Bauman and Mr. Swift were referencing when they testified that toward the end of the conspiracy, the pallets usually contained 80 pounds.

In *United States v. Roberts*, we held that an estimate entailed clear error because the district court had attempted to extrapolate drug quantities from one time period to another. 14 F.3d 502, 521 (10th Cir. 1993). There one defendant admitted that he had bought and redistributed 150-200 pounds of methamphetamine between 1987 and February 1991. *Id.* at 520. The district court used this figure to estimate that the defendant was responsible for distributing 60 pounds of methamphetamine between

January 1, 1989, and February 26, 1991. *Id.* at 519-20. We rejected this estimate, concluding that the district court had "ground[ed] its conclusion in midair" because no reasonable basis existed to extrapolate the finding from the 150-200 pounds that the defendant had admitted. *Id.* at 521.

United States v. Richards is also instructive. 27 F.3d 465 (10th Cir. 1994). There a witness testified that she had bought drugs from the defendant in amounts varying from week to week, "sometimes one or two grams and sometimes four or five." *Id.* at 469. Law enforcement then used the maximum weekly quantity of five grams to estimate that the witness had purchased "80 grams, on the assumption that she [had] purchased five grams per week for sixteen weeks." *Id.* We concluded that this calculation was based on "insufficient minimally reliable evidence" because the testimony had been vague, conflicting, and unsupported by other evidence. *Id.*

Though Mr. Bauman and Mr. Swift are arguably more reliable than the witness in *Richards*, their testimony was also vague. Without a way to tie their testimony concerning the pallets of 80 pounds to the shipments attributed to Roosevelt, the testimony of Mr. Bauman and Mr. Swift was insufficient to attribute 1,600 pounds to Roosevelt.

The government argues that any error would be harmless because there was other evidence of marijuana attributable to Roosevelt. The burden falls on the government to demonstrate, by a preponderance of the evidence, that the error did not affect Roosevelt's substantial rights. *United States v. Harrison*, 743 F.3d 760, 764 (10th Cir. 2014).

The government did not satisfy this burden. The government's argument on harmlessness consists of a single sentence, referring to 37 pounds and 200 marijuana plants seized from a co-conspirator. Under the guidelines, each marijuana plant counted as 100 grams. U.S.S.G. § 2D1.1 applic. note (E). Thus, the additional evidence would account for just over 81 pounds, which was only about 5% of the marijuana weight that the district court attributed to Roosevelt. Thus, the government's reliance on additional evidence would not take the district court's finding outside the realm of speculation. In these circumstances, we remand for the district court to reassess the quantity of marijuana attributable to Roosevelt.

C. Upward Variance

Though we remand to the district court for resentencing, we address Roosevelt's argument that the upward variance of 33 months was substantively unreasonable.[8]

District courts enjoy broad discretion in sentencing, but sentences must be substantively reasonable. *United States v. Hanrahan*, 508 F.3d 962, 969 (10th Cir. 2007). Substantive reasonableness focuses on the length of the

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[8] The district court stated that it was departing upward from the guideline range, but Roosevelt characterizes the sentence as a variance. The government refers to the sentence as both a departure and a variance and seems to use the terms interchangeably. We conclude that the court actually applied a variance rather than a departure. The district court imposed the sentence based on the 18 U.S.C. § 3553(a) factors. When a court applies the § 3553(a) factors to impose a sentence outside the guideline range, the district court is applying a variance rather than a departure. *See United States v. Alapizco-Valenzuela*, 546 F.3d 1208, 1221-22 (10th Cir. 2008).

sentence and requires that sentences be neither too long nor too short. *Id.*

We review substantive reasonableness under the abuse-of-discretion standard, which requires us to give substantial deference to the district court. *United States v. Friedman*, 554 F.3d 1301, 1307 (10th Cir. 2009). The district court abuses that discretion when rendering a decision that is arbitrary, capricious, whimsical, or manifestly unreasonable. *Id.*

Roosevelt was sentenced to 201 months' imprisonment, 33 months above the upper end of his guideline range. The district court justified the variance on the ground that Roosevelt had pressured a co-defendant, Ms. Sadie Brown, into not cooperating with the government. Because Ms. Brown did not cooperate with the government, she did not receive a "safety-valve" adjustment. *See* 18 U.S.C. § 3553(f)(5); U.S.S.G. § 5C1.2(a)(5). Without this adjustment, Ms. Brown obtained a sentence 12-33 months higher than she might otherwise have received.

Roosevelt argues that the district court lacked evidence to find manipulation of Ms. Brown. We reject this argument. The district court could reasonably rely on the evidence presented at Roosevelt's sentencing, combined with what the court had already known from Ms. Brown's sentencing. *See United States v. Spears*, 197 F.3d 465, 471 (10th Cir. 1999).[9]

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[9] Our understanding of Ms. Brown's sentencing comes from our review of Ms. Brown's sentencing transcripts. *See* Tr. of Sentencing Volume II, *United States v. Brown*, No. 12-20083-03-KHV-3 (D. Kan. Mar. 9, 2015), ECF No. 1813; Tr. of Sentencing Volume III, *United States v. Brown*, No. 12-20083-03-KHV-3 (D. Kan. Mar. 12, 2015),

At Roosevelt's sentencing, the government produced two letters that Ms. Brown had received from Roosevelt. The first letter opens with "How is my favorite student?" and instructs Ms. Brown how to handle her criminal case. R. vol. 5, at 1. She was to try to withdraw her guilty plea, file a direct appeal based on ineffective legal assistance, and send a copy of correspondence about her case "home to [Roosevelt's mother]." *Id.* at 1. The letter adds that trying for the safety-valve adjustment now would not hurt anyone. *Id.* at 2. The second letter similarly tells Ms. Brown how to handle her sentencing and again says that her counsel provided ineffective assistance. Notably, Roosevelt sent these letters only after the end of his own criminal trial.

Upon receipt of these letters, Ms. Brown tried to qualify for the safety-valve adjustment. At her sentencing, the government contended that Ms. Brown was ineligible because she had not been truthful. Tr. of Sentencing Volume II at 30-32, *United States v. Brown*, No. 12-20083-03-KHV-3 (D. Kan. Mar. 9, 2015), ECF No. 1813. Ms. Brown testified that she had provided information to the best of her ability and that she had decided to pursue the safety-valve adjustment only after obtaining permission from Roosevelt.

The government then called the case agent who had conducted the safety-valve interview. The case agent testified that Ms. Brown had not been forthcoming during her interview, adding that "during the course of the prof-

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ECF No. 1815. The same district judge presided over the criminal cases of both Roosevelt and Ms. Brown and relied partly on evidence from Ms. Brown's sentencing. Roosevelt does not question the district court's ability to rely on Ms. Brown's sentencing proceedings.

fer examination, there [had been] statements made relative to the Dahdas[']] manipulation of [Ms. Brown]" and that it had appeared that the Dahdas were continuing to communicate with Ms. Brown. *Id.* at 36-37. The case agent opined that during the safety-valve interview, there was discussion that the Dahdas had treated Ms. Brown "like a slave. . . ." *Id.* at 37.

After hearing this testimony, the district court continued the sentencing to give Ms. Brown a second opportunity to qualify for a safety-valve adjustment. At the continued hearing, the case agent testified that Ms. Brown had still not been completely truthful and had minimized the criminal activity of individuals related to Roosevelt. For instance, the case agent expressed the belief that Ms. Brown had minimized the involvement of co-defendant Nathan Wallace—Roosevelt's half-brother—who had yet to be sentenced. Tr. of Sentencing Volume III at 73, *United States v. Brown*, No. 12-20083-03-KHV-3 (D. Kan. Mar. 12, 2015), ECF No. 1815. Ms. Brown explained that she had not pursued the safety-valve adjustment earlier because she had not wanted to testify against Los and Roosevelt. *Id.* at 87. Ultimately, the district court determined that Ms. Brown had failed to satisfy the requirements for a safety-valve adjustment. *Id.* at 84.

At Roosevelt's sentencing, the district court found that Roosevelt was "legally and morally responsible for [the] extra time that [Ms. Brown] [was] doing" and that a sentence within the guideline range would not "adequately take into account all of the relevant conduct here." R. vol. 3, at 2685-86. These findings were not clearly erroneous. Thus, we conclude that the district court (1) acted within its discretion in varying upward and (2) imposed a substantively reasonable sentence.

V. Forfeiture

Roosevelt's final argument is that the district court erred in ordering forfeiture in the amount of $16,985,250. According to Roosevelt, the forfeiture order should be vacated for three reasons:

1. The district court violated the federal rules by failing to enter a preliminary order of forfeiture.

2. The district court lacked sufficient evidence for the amount of the forfeiture.

3. The district court failed to specify the amount of the forfeiture.

We reject these arguments.

First, Roosevelt urges vacatur of the forfeiture order because the district court failed to enter a preliminary order of forfeiture as required by Fed. R. Crim. P. 32.2(b). Roosevelt did not raise this argument in district court, and our review is limited to the plain-error standard. *United States v. Wright*, 848 F.3d 1274, 1280-81 (10th Cir. 2017). We find plain error when (1) the ruling is erroneous, (2) the error is plain, (3) the error affects substantial rights, and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Romero*, 491 F.3d 1173, 1178 (10th Cir. 2007); *see* Part IV(A) above.

Rule 32.2 provides that upon a finding that property is subject to forfeiture, the court must enter a preliminary forfeiture order "sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final. . . ." Fed. R. Crim. P.

32.2(b)(2)(A)-(B), 32.2(b)(4)(A). The court did not comply with this requirement.

The government concedes that this omission constituted an error that was plain. The resulting issue is whether the error affected Roosevelt's substantial rights and "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 732 (1993). The error affected Roosevelt's substantial rights only if the outcome was likely affected. *Romero*, 491 F.3d at 1178.

The outcome here was unaffected because Roosevelt had notice of a potential forfeiture in the amount of $16,985,250. Indeed, Roosevelt does not question the existence of notice. Nor could he do so, for he objected before the hearing to any forfeiture. R. vol. 3, at 2678-80; R. vol. 4, at 77-78.[10]

Though he was on notice of a potential forfeiture, Roosevelt argues that he was deprived of "procedures to contest the deprivation of property rights." Appellant's Reply Br. at 22 (internal quotation marks & emphasis omitted). He argues that his circumstances are analogous to those in *United States v. Shakur*, where the defendant had "timely contested six of the government's Forfeiture Allegations, but his objections were entirely ignored." 691 F.3d 979, 988 (8th Cir. 2012).

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[10] In objecting before the hearing, Roosevelt argued that it was unclear how much of the $16,985,250 had been generated by sales of marijuana rather than cocaine. R. vol. 4, at 77. That objection was addressed to Roosevelt's satisfaction at the sentencing, and the issue became moot. R. vol. 3, at 2680.

Roosevelt does not explain how the lack of a preliminary forfeiture order deprived him of an opportunity to be heard. Nor does he argue that he would have made additional objections if a preliminary order of forfeiture had been entered. These circumstances differ from those in *Shakur*, where the defendant's pre-sentencing objections were completely ignored.

In contrast, Roosevelt's only objection was addressed to his satisfaction at the sentencing. Nor is it true here, as it was in *Shakur*, that "[t]he only mention of forfeiture came at the very end of the lengthy hearing when the district court stated, after pronouncing Shakur's sentence, 'I am going to enter a forfeiture in this case.' " *Id.* at 986. Thus, we conclude that the lack of a preliminary order of forfeiture did not affect Roosevelt's substantial rights.

In addition, Roosevelt "challenges the forfeiture judgment for the same reasons that he challenges his conspiracy conviction, namely that there was insufficient evidence of the single conspiracy, and a variance." Appellant's Opening Br. at 59. We reject this argument for the same reasons discussed above. *See* Parts I-II, above.

Roosevelt also urges vacatur on the ground that the final judgment did not state the forfeiture amount. It is true that the final judgment omitted the amount of the forfeiture. Instead, the judgment purported to make the preliminary order of forfeiture final as to Roosevelt. But as just discussed, the court never filed a preliminary order of forfeiture. As a result, the final judgment failed to incorporate the amount of the forfeiture.

It was clear from the sentencing proceeding, however, that forfeiture was ordered in the amount alleged in the superseding indictment and reported in the presentence

report, $16,985,250. R. vol. 3, at 2679-80 (addressing Roosevelt's objection to the forfeiture amount listed in the presentence report). Federal Rule of Criminal Procedure 32.2(b)(4)(B) provides that the court must (1) "include the forfeiture when orally announcing the sentence or must otherwise ensure that the defendant knows of the forfeiture at sentencing" and (2) "include the forfeiture order, directly or by reference, in the judgment, but the court's failure to do so may be corrected at any time under Rule 36." In turn, Rule 36 provides that "the court may at any time correct a clerical error in a judgment. . . ." Fed. R. Crim. P. 36.

Roosevelt does not dispute oral pronouncement of a forfeiture order in the amount of $16,985,250. Thus, the failure to specify the forfeiture amount in the final judgment is an error that may be corrected "at any time" under Rule 36. *See United States v. Sasser*, 974 F.2d 1544, 1561 (10th Cir. 1992) *United States v. Sasser*, 974 F.2d 1544, 1561 (10th Cir. 1992) (holding that a written judgment could be corrected to provide that the defendant's sentences would be served consecutively because the sentencing transcript revealed that the district court had intended the sentences to run consecutively); *see also United States v. Villano*, 816 F.2d 1448, 1451 (10th Cir. 1987) (en banc) ("The sentence orally pronounced from the bench is the sentence.").

In sum, the failure to state the forfeiture amount in the judgment does not warrant vacatur of the forfeiture. But we call the oversight to the attention of the district court so that it may correct the judgment.

We affirm the order of forfeiture in the amount of$16,985,250.

VI. Disposition

We affirm the convictions and forfeiture order, but remand for resentencing based on the error in calculating the amount of marijuana attributable to Roosevelt.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

No. 12-20083-02-04-05-KHV

UNITED STATES OF AMERICA, Plaintiff,

v.

LOS ROVELL DAHDA, ROSSEVELT RICO DAHDA, and JUSTIN CHERIF PICKEL, Defendants.

April 15, 2014

ORDER

VRATIL, District Judge.

On July 11, 2012, a grand jury charged defendants and others with conspiracy to possess with intent to distribute and to distribute five kilograms or more of a mixture and substance containing cocaine, a controlled substance; to possess with intent to distribute and to distribute 1,000 kilograms or more of marijuana, a controlled substance; and maintaining drug-involved premises, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A)(ii) and (b)(1)(A)(vii); 21 U.S.C. §§ 846, 856 and 18 U.S.C. § 2. The indictment also charged individual defendants with multiple other drug crimes.

This matter comes before the Court on *Defendant Los Dahda's Motion To Suppress The Contents Of Communications Intercepted Pursuant To Orders Insufficient On Their Face* (Doc. # 1143) filed January 2, 2014, which co-defendant Roosevelt Dahda has joined; *Defendant Los Dahda's Motion To Suppress The Contents of Unlawfully Intercepted Communications* (Doc. # 1145) filed January 2, 2014, which co-defendants Roosevelt Dahda and Justin Pickel have joined; and Justin Pickel's *Motion To Suppress Evidence* (Doc. # 1140) filed January 2, 2014, which co-defendants Los Dahda and Roosevelt Dahda have joined. The Court referred each of these motions to Magistrate Judge James P. O'Hara for a report and recommendation. On April 2, 2014, Judge O'Hara recommended that the Court overrule each of these motions. *See Report And Recommendation* (Doc. ## 1249, 1250, 1251). The deadline to file objections was April 15, 2014.

Los Dahda has timely objected to the report and recommendations regarding the motion to suppress the contents of communications (Doc. # 1143) and the motion to suppress the contents of unlawfully intercepted communications (Doc. # 1145). *See Defendant Los Dahda's Objections To The Magistrate's Reports And Recommendations* (Doc. # 1327) filed April 15, 2014. Justin Pickel has timely filed objections to the report and recommendations regarding his motion to suppress (Doc. # 1140). *See Defendant Justin C. Pickel's Objections To Report And Recommendations* (Doc. # 1328) filed April 15, 2014. For reasons set forth below the Court overrules defendants' objections, adopts the report and recommendations and overrules defendants' motions to suppress.

Legal Standards

The Court reviews de novo any part of the magistrate judge findings or recommendations to which an objection is made. *See* 28 U.S.C. § 636(b)(1); Fed. R. Crim. P. 59(b)(3). The Court may accept, reject or modify in whole or in part the findings or recommendations made by the magistrate judge. *Id.* Also, the Court may receive further evidence or return the matter to the magistrate judge with instructions. *Id.*

Analysis

I. *Defendant Justin C. Pickel's Objections* (Doc. # 1328) *To Report And Recommendation* (Doc. # 1250) *Regarding Motion To Suppress Evidence* (Doc. # 1140)

Pickel filed a motion to suppress evidence which officers seized as a result of a traffic stop in Nebraska and a search of Pickel's home in California.

Pickel asserts that the Nebraska traffic stop was illegal because he did not commit a traffic or equipment violation and the government did not prove that officers had probable cause or reasonable suspicion that he was committing a crime when they stopped him. Pickel argues that the Court must therefore suppress all evidence seized in connection with the stop. He also asserts that the search warrant for his California residence was not supported by probable cause, and thus the Court must suppress all evidence found during the search.

On March 25 and 26, 2014, Judge O'Hara held an evidentiary hearing. After considering the evidence, Judge O'Hara found that Nebraska Highway Patrol Trooper

Kurt Frazey had a reasonable articulable suspicion that Pickel's pickup had violated a Nebraska state law which requires that vehicles have adequate fenders or mud flaps. *See* Neb. Rev. Stat. § 60-6,283.[1] Judge O'Hara found that the stop was therefore objectively justified at its inception. Judge O'Hara further found that after the traffic stop ended, Pickel voluntarily consented to additional questioning, and that Trooper Frazey and another officer then developed probable cause to believe that illegal drugs were in the pickup. In the alternative, Judge O'Hara found that Trooper Frazey had probable cause to stop the pickup based on collective knowledge of law enforcement that the pickup was transporting a large amount of marijuana.

Pickel objects to the finding that Trooper Frazey had reasonable suspicion that his truck tires violated Nebraska law. Judge O'Hara conducted a visual inspection of the truck before making his ruling. Although the Court has not had that opportunity, it has reviewed pictures of the truck, see Government Exhibits 21-25, and finds that Judge O'Hara correctly determined that the tires arguably violated the Nebraska statute.

Pickel also objects to Judge O'Hara's findings that after the traffic stop ended, Pickel voluntarily consented to additional questioning which led the officers to develop probable cause to believe that illegal drugs were in the

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[1] Neb. Rev. Stat. § 60-6,283 provides as follows:

Every new motor vehicle or semitrailer purchased after January 1, 1956, and operated on any highway in this state shall be equipped with fenders, covers, or devices, including flaps or splash aprons, unless the body of the vehicle affords adequate protection to effectively minimize the spray or splash of water or mud to the rear of the motor vehicle or semitrailer.

pickup and that Trooper Frazey had probable cause to stop the pickup based on collective knowledge of law enforcement that the pickup was transporting a large amount of marijuana. Pickel does not point to any relevant factual errors in the report and recommendations. The Court has reviewed the Judge O'Hara's thorough analysis and finds no legal error. The Court therefore overrules Pickel's objections.

II. *Defendant Los Dahda's Objections* (Doc. # 1327) *To The Magistrate's Report And Recommendation* (Doc. ## 1249, 1251) *Regarding Motions To Suppress* (Doc. ## 1145, 1143)

A. Motion To Suppress (Doc. # 1145)

Los Dahda seeks to suppress evidence of recorded telephone calls (and evidence derived from those calls) which the government intercepted pursuant to wiretap orders. Under 18 U.S.C. § 2518(10)(a)(i), Los Dahda argues that the wiretap orders were not necessary.

After an evidentiary hearing, Judge O'Hara made detailed findings of fact regarding the basis for the wiretap applications. Judge O'Hara correctly cited the legal standard for proving that a wiretap is invalid. *See* Doc. # 1249 at 19 n. 26 (citing *United States v. Foy*, 641 F.3d 455, 464 (10th Cir. 2011)). Based on the totality of the evidence, Judge O'Hara found that the wiretaps were proper and necessary.

Los Dahda objects to the finding that (1) there was probable cause to believe the wiretaps would lead to new, non-cumulative evidence, and (2) the wiretaps were legally necessary for the government to further its objec-

tives. Defendant does not point to any specific factual findings or errors of law. The Court has carefully reviewed the parties' briefs and the report and recommendation and finds that the objections should be overruled.

B. Motion To Suppress (Doc. # 1143)

Citing 18 U.S.C. § 2518(3) and 10(a)(ii), Los Dahda seeks to suppress evidence derived from the court ordered wiretaps because on their face the orders exceeded the territorial jurisdiction of the issuing court.

In his report and recommendation, Judge O'Hara thoroughly summarized the facts, defendant's argument and the pertinent case law. He concluded that although the wiretap order permitted interception outside this Court's jurisdiction, the government did not actually intercept cellular communications outside this Court's jurisdiction. Therefore, as applied, the orders did not violate the statute.

Los Dahda objects to the finding that (1) mobile phones fall within the "mobile interception device" exception to Title III territorial limitations, and (2) territorial restrictions were not one of the substantive concerns of Congress in enacting Title III. He does not, however, point to any specific factual findings or errors of law. The Court has carefully reviewed the parties' briefs and the report and recommendation and finds that the objections should be overruled.

IT IS THEREFORE ORDERED that *Defendant Los Dahda's Objections To The Magistrate's Reports And Recommendations* (Doc. # 1327) filed April 15, 2014 be and hereby are **OVERRULED.**

IT IS FURTHER ORDERED that *Defendant Justin C. Pickel's Objections To Report And Recommendations* (Doc. # 1328) filed April 15, 2014 be and hereby are **OVERRULED.**

IT IS FURTHER ORDERED that the Court hereby **adopts** the *Report And Recommendation* (Doc. # 1249) filed April 2, 2014.

IT IS FURTHER ORDERED that the Court hereby **adopts** the *Report And Recommendation* (Doc. # 1250) filed April 2, 2014.

IT IS FURTHER ORDERED that the Court hereby **adopts** the *Report And Recommendation* (Doc. # 1251) filed April 2, 2014.

IT IS FURTHER ORDERED that *Defendant Los Dahda's Motion To Suppress The Contents Of Communications Intercepted Pursuant To Orders Insufficient On Their Face* (Doc. # 1143) filed January 2, 2014, which co-defendant Roosevelt Dahda has joined be and hereby is **OVERRULED.**

IT IS FURTHER ORDERED that *Defendant Los Dahda's Motion To Suppress The Contents of Unlawfully Intercepted Communications* (Doc. # 1145) filed January 2, 2014, which codefendants Roosevelt Dahda and James Pickel have joined be and hereby is **OVERRULED.**

IT IS FURTHER ORDERED that Justin Pickel's *Motion To Suppress Evidence* (Doc. # 1140) filed January 2, 2014, which co-defendants Los Dahda and Roosevelt Dahda have joined be and hereby is **OVERRULED.**

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

No. 12-20083-01-KHV

UNITED STATES OF AMERICA, Plaintiff,

v.

LOS ROVELL DAHDA, et al., Defendants.

April 2, 2014

REPORT AND RECOMMENDATION

O'HARA, United States Magistrate Judge.

This is a drug conspiracy case. Before the court is the motion of defendant Los Rovell Dahda to suppress from evidence recorded telephone calls, and other evidence derived from those calls, that the government intercepted pursuant to wiretap orders that defendant contends were facially invalid (ECF doc. 1143).[1] The presiding U.S. District Judge, Kathryn H. Vratil, referred the motion to the undersigned U.S. Magistrate Judge, James P. O'Hara, for

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[1] Co-defendants Roosevelt Rico Dahda and David Essman have joined in this motion.

a report and recommendation.[2] The undersigned held a hearing on the motion on March 25-26, 2014. For the reasons discussed below, the undersigned recommends the motion be denied.

During the government's investigation, the court issued, upon the government's application, nine separate orders authorizing the government to intercept communications on targeted cellular telephones ("wiretap orders"). Each wiretap order provided that "in the event [the target telephones] are transported outside the territorial jurisdiction of the court, interception may take place in any jurisdiction within the United States."[3] Defendant argues that because the wiretap orders did not explicitly require the government to maintain a listening post in Kansas when the telephones left the state, they exceeded the court's territorial jurisdiction, making them facially deficient.

Investigative wiretaps are governed by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2516 et seq. Upon application, if the court finds there is statutory cause for a wiretap, it

> may enter an ex parte order, as requested or modified, authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within

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[2] ECF doc. 1183.

[3] Gov. Exhs. 3, 6, 9, 12, 15, 18, 21, 24, 27 & 30.

> the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction).[4]

"Interception" occurs both at the location of the tapped telephone and at the location of the government's listening post.[5] "[A] wiretap authorization order is presumed proper, and a defendant carries the burden of overcoming this presumption."[6]

There is no dispute that the tapped telephones traveled outside of Kansas, i.e., outside the jurisdiction of this issuing court. There also is no dispute that the government monitored the communications from a listening post in Kansas, i.e., within the jurisdiction of this issuing court.[7] The only questions, then, are whether the wiretap orders were facially invalid because they *permitted* interception outside of the issuing court's jurisdiction, and, if so, whether evidence obtained under the orders *must* be suppressed even though the orders as executed did not violate the statutory provision.

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[4] 18 U.S.C. § 2518(3).

[5] *See United States v. Tavarez*, 40 F.3d 1136, 1138 (10th Cir. 1994); *United States v. Ramirez*, 112 F.3d 849, 852 (7th Cir. 1997); *United States v. Denman*, 100 F.3d 399, 403 (5th Cir. 1996); *United States v. Rodriguez*, 968 F.2d 130, 136 (2d Cir. 1992).

[6] *United States v. Smart*, 278 F.3d 1168, 1172 (10th Cir. 2002) (quoting *United States v. Quintana*, 70 F.3d 1167, 1169 (10th Cir. 1995)).

[7] Detective Mike McAtee testified that the target telephones were monitored from a listening post in Overland Park, Kansas. There is one exception: Target Telephone 7 was monitored from a listening post in Missouri. The government has stated, however, that it will not use any of the calls derived from monitoring Target Telephone 7 in the trial of the remaining defendants. Therefore, defendant's motion is moot as to Target Telephone 7.

The government argues that the wiretap orders were not facially invalid because the language "in the event [the target telephones] are transported outside the territorial jurisdiction of the court, interception may take place in any jurisdiction within the United States" is preceded by the language "[p]ursuant to Title 18, United States Code § 2518(3)." Thus, the extra-territorial jurisdictional grant was given only to the extent permitted by the statute, i.e., "in the case of a mobile interception device." Defendant argues that the "mobile interception device" exception to the court's jurisdictional limit does not apply because cellular telephones are not "mobile interception devices."

The phrase "mobile interception device" is not defined in Title III. The Tenth Circuit has not interpreted the phrase nor addressed whether courts may authorize interception of cellular telephone calls via listening posts located outside the jurisdictional territory of the issuing court. The undersigned finds guidance, however, in the opinion of Chief Judge Richard Posner, writing for the Seventh Circuit in *United States v. Ramirez*.[8] In *Ramirez*, the court approved the exact jurisdictional language included in the wiretap orders at issue here, and concluded that § 2518(3) authorized interception of cellular phone calls via listening posts located outside the jurisdictional territory of the issuing court. The government had sought a wiretap order for the cellular telephone of a suspect who traveled between Wisconsin and Minnesota. The government obtained a wiretap order from a federal judge in Wisconsin, where the conspiracy was being investigated and would later be prosecuted. The wiretap order, like the orders at issue here, stated, "in the event that the

[8] 112 F.3d 849, 851 (7th Cir. 1997).

cellular telephone is transferred outside the territorial jurisdiction of this Court, interceptions may take place in any other jurisdiction within the United States."[9] The government set up a listening post in Minnesota and soon discovered that the user of the phone did not seem to travel outside Minnesota. The defendant moved to suppress all evidence obtained under the wiretap order.

Judge Posner recognized that under a literal reading of § 2518(3), the Wisconsin judge was not permitted to authorize the interception at a stationary listening post located outside Wisconsin calls from a cellular telephone also located outside Wisconsin.[10] Judge Posner concluded, "The literal reading makes very little sense."[11] Because cellular telephones are likely to be carried out of the issuing district given their mobility, a literal reading would mean that where, for practical investigatory reasons, the government sets up a listening post outside of the issuing jurisdiction, it would be required to obtain a wiretap order from the district court in which the listening post is located "even though that location is entirely fortuitous from the standpoint of the criminal investigation."[12] Judge Posner further concluded that "[t]he narrow, literal interpretation would serve no interest in protecting privacy, since the government can always seek an order from the district court for the district in which the listening post is located authorizing nationwide surveillance of cellular

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[9] *Id.* at 852.

[10] *Id.*

[11] *Id.*

[12] *Id.*

phone calls. The narrow interpretation would merely complicate law enforcement."[13]

Because a literal reading of the statutory language did not make sense, Judge Posner turned to the legislative history of Title III and concluded "that 'mobile interception device' was intended to carry a broader meaning than the literal one."[14] The legislative history speaks only in terms of listening devices installed in vehicles, stating that the term applies "to both a listening device installed in a vehicle and to a tap placed on a cellular or other telephone instrument installed in a vehicle."[15] The Seventh Circuit took "this description to be illustrative rather than definitional because there is no limitation to vehicles in the statute."[16] Judge Posner than stated, "The emphasis in 'mobile interception device' falls . . . on the mobility of what is intercepted rather than on the irrelevant mobility or stationarity of the device. The term in context means a device for intercepting mobile communications, and so understood it authorized the district judge in the Western District of Wisconsin to order a tap on the phone thought to be used by [the defendant] regardless of where the phone or the listening post was."[17]

Defendant urges the court to reject *Ramirez* in favor of the concurring opinion of Judge Harold DeMoss in the

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[13] *Id.* at 853.

[14] *Id.* at 852.

[15] S. Rep. No. 541, 99th Cong., 2d Sess. 30 (1986), U.S. Code Cong. & Admin. News 1986, pp. 3555, 3584.

[16] *Ramirez*, 112 F.3d at 852.

[17] *Id.* at 853.

Fifth Circuit case of *United States v. North*.[18] In interpreting "mobile interception device," Judge DeMoss concluded that "'[m]obile' modifies 'device,' thus the phrase 'mobile interception device' on its face appears to refer to the mobility of the device used to intercept communications, not the mobility of the tapped phone."[19] Under this reading of the statute, the "mobile interception device" exception gives a court jurisdiction to authorize interception of cellular telephone communications anywhere in the United States, so long as the government uses an interception device that is mobile rather than stable.[20]

The court finds the opinion of the Seventh Circuit in *Ramirez* more persuasive—both as a matter of precedential value and substantive reasoning—than the concurring opinion of Judge DeMoss in *North*.[21] However, even under Judge DeMoss's reasoning, the language in the wiretap orders that defendant deems offensive—i.e., "in the event [the target telephones] are transported outside the territorial jurisdictions of the court, interception may take place in any jurisdiction within the United States"—would not invalidate the orders on their face. Rather, in this situation, Judge DeMoss would look to the application of the order to ensure that the device the government used to make interceptions was mobile. In the case at bar, although the wiretap order *permitted* interception outside this court's jurisdiction, the government did not actually

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[18] 735 F.3d 212, 215-19 (5th Cir. 2013) (DeMoss, J. concurring).

[19] *Id.* at 218.

[20] *See id.*

[21] Defendant stated during oral argument that there is no Tenth Circuit precedent that indicates which position, if either, the Tenth Circuit would adopt if presented with the question.

intercept cellular communications outside this court's jurisdiction, making the question academic.

Given the absence of caselaw supporting his position, defendant has not carried his burden of overcoming the presumption in this circuit that the wiretap authorization orders were proper. The undersigned therefore recommends that Judge Vratil conclude the wiretap orders issued in this case were not invalid on their face. In the event Judge Vratil rejects this recommendation and finds the wiretap orders facially invalid, the undersigned still recommends that the evidence obtained under the wiretap orders not be suppressed. In this case, as explained below, the undersigned finds that the language "in the event [the target telephones] are transported outside the territorial jurisdictions of the court, interception may take place in any jurisdiction within the United States" was surplusage and did not implicate Congress's core concerns in passing Title III.

Title III specifies that "[w]henever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any . . . proceeding . . . if the disclosure of that information would be in violation of this chapter."[22] The statute further states that an

> aggrieved person . . . may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that—

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[22] 18 U.S.C. § 2515.

> (i) the communication was unlawfully intercepted;
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> (ii) the order of authorization or approval under which it was intercepted is *insufficient on its face;* or
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> (iii) the interception was not made in conformity with the order of authorization or approval.[23]

In *United States v. Radcliff,* the Tenth Circuit addressed for the first time whether evidence obtained under a facially insufficient wiretap order must be suppressed.[24] The court concluded that suppression is not required (under 18 U.S.C. § § 2518(10)(a)(i) or (ii)) "if the violated provision of Title III 'does not establish a substantive role to be played in the regulatory system.'"[25] Stated another way, "suppression is only required . . . when there is a 'failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.'"[26]

Neither the Tenth Circuit nor the District of Kansas has addressed whether the jurisdictional provision in 18 U.S.C. § 2518(3) directly and substantially implements the intent of Congress in enacting Title III. Other than the brief mention of listening devices installed on vehicles, the legislative history of the act is silent regarding Title

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[23] *Id.* § 2518(10)(a) (emphasis added).

[24] 331 F.3d 1153, 1162 (10th Cir. 2003).

[25] *Id.* (quoting *United States v. Chavez,* 416 U.S. 562, 578 (1974)).

[26] *Id.* (quoting *United States v. Giordano,* 416 U.S. 505, 527 (1974)).

III's jurisdictional requirement. Viewing the act as a whole, the Supreme Court has recognized that the purpose of Title III "was effectively to prohibit, on the pain of criminal and civil penalties, all interceptions of oral and wire communications, except those specifically provided for in the Act, most notably those interceptions permitted to law enforcement officers when authorized by court order in connection with the investigation of the serious crimes listed in § 2516."[27] The Tenth Circuit has looked to the legislative history of the act to determine "the overall purposes of Title III":

> Virtually all concede that the use of wiretapping or electronic surveillance techniques by private unauthorized hands has little justification where communications are intercepted without the consent of one of the participants. No one quarrels with the proposition that the unauthorized use of these techniques by law enforcement agents should be prohibited. . . . Only by striking at all aspects of the problem can privacy be adequately protected.[28]

The undersigned finds that the jurisdictional provision of § 2518(3) does not directly and substantially implement the intent of Congress in enacting Title III. The undersigned reaches this conclusion based both on the silence of the legislative history regarding this provision and on the overall purposes of the act as recognized by the Supreme Court and the Tenth Circuit. The jurisdictional requirement does not implicate Congress's concerns for privacy and preventing the government's unauthorized use

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[27] *Giordano*, 416 U.S. at 514 (footnote omitted).

[28] *Anthony v. United States*, 667 F.2d 870, 880 (10th Cir. 1981).

of surveillance techniques.[29] Accordingly, the undersigned recommends to Judge Vratil, should she reach this issue, that the evidence obtained under the wiretap orders not be suppressed.

IT IS THEREFORE RECOMMENDED that defendant's motion to suppress evidence be denied.

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[29] *See Adams v. Lankford*, 788 F.2d 1493, 1498 (11th Cir. 1986) (holding that "core congressional concerns [under § 2518(3)] do not include the matter of" a county judge authorizing a wiretap in a neighboring county). *But see North*, 735 F.3d at 219 (DeMoss, J., concurring) ("I . . . think that the territorial jurisdiction limitation serves important substantive interests and implicates core concerns of the statute, despite the lack of legislative history."); *United States v. Glover*, 736 F.3d 509, 515 (D.C.Cir. 2013) (stating in dicta, "Even if we thought that an inquiry into the core concerns of the statute were permitted under paragraph (ii), we would, nevertheless, agree with the Fifth Circuit, which recently held that territorial jurisdiction is a core concern of Title III.").